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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
At Law and in Equity,
AND IN THE
EXCHEQUER CHAMBER,
In Equity and in Error,
FROM
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BOTH INCLUSIVE.
VOL. V.

By GEORGE PRICE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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ERRATA.

VOL. IV.

- Page 152, l. 7, for "*would*" read "*could*."
217, l. 3, dele "*being*."

VOL. V.

- In the running title, from page 189 to page 267, inclusive,
for "59th" read "58 Geo. III."
- Page 331, l. 11, for "*the purchasers to assert their claim of*" read
"*the purchaser to assert his claim to*."
- 361, l. 4, for "*material*" read "*mutual*."
- 380, for "*p. 49*," in the note, read "*p. 419*."
- 389, in the last line of the note, after the last word, read
"*answer further or not*."
- 392, l. 16, for "*part*" read "*fact*."
- 412, in last marginal reduction, for "*amend*" read "*plead*."
- 428, l. 15 of marginal reduction, for "*to*" read "*by*."
- 468, last word of marginal reduction, for "*confess*" read
"*confessis*."
- 472, l. 1, after "*hearing*" add "*counsel*."
- 512, l. 9, after "*bushels*" read "*beyond the first ten*."
- 607, l. 4, from bottom, of marginal reduction, for "*to a
want*" read "*of a want*."

J U D G E S

OF THE

COURT OF EXCHEQUER,

**During the Period of the Reports contained in this
Volume.**

**The Right Honourable Sir R. RICHARDS,
Knt. L. C. B.**

Sir ROBERT GRAHAM, Knt.

Sir GEORGE WOOD, Knt.

Sir WILLIAM GARROW, Knt.

Sir S. SHEPHERD, Knt. Attorney General.

Sir R. GIFFORD, Knt. Solicitor General.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

MICHAELMAS TERM,—58 GEO. III.

JAMES v. FRANCIS.

JONES, D. F. moved for a rule to shew cause why the defendant should not be allowed his costs under the 43 *Geo. III. c. 46, s. 3*, and that in the mean time proceedings might be stayed, on an affidavit, stating that the defendant was arrested for the sum of 25*l.*;—that being advised by his solicitor, that he had a good defence to the action, he pleaded the general issue, except as to 12*l. 10s.* part thereof, and as to that he pleaded in abatement, that if the debt were due, it was contracted jointly with another person, and not

1817:

Friday,
7th November.

The defendant was held to bail on an action for 25*l.* He pleaded in abatement as to 12*l. 10s.* and the general issue as to the remainder. Verdict for the plaintiff for the latter sum. On motion for costs under the 43 *Geo. III. c. 46.* supported by affidavit, that the defendant believed the plaintiff had sued out bailable pro-

cess for the purpose of extorting from him the whole sum,—held not a case of malicious arrest within the statute.

1817.

 JAMES
 v.
 FRANCIS.

by defendant alone;—that on the trial, the plaintiff recovered a verdict for 12*l.* 10*s.* only;—that the ground of his defence was, that several pieces of timber, charged to him at 13*l.* 19*s.* 6*d.* never had been sold to, or delivered to him, and that for the lot of timber which was delivered, the defendant ought to have been sued jointly with his said partner;—and that he believed the plaintiff had sued out bailable process to extort from the defendant the whole of such demand.


It was submitted, that the facts as detailed in the affidavit supported the present application, on the ground of the arrest having been vexatious.

But the Court were of opinion that the circumstances did not amount to a case of malice within the provision of the statute: and therefore the motion was

Refused.

Friday,
 7th November.

WATSON v. EDMUNDS.


 A Commissioner appointed by the 4 & 5 Wm. and Mary, is not bound by the letter of that act to take no more than 2*s.* for taking bail, if he have been put to expence by travelling, or has taken extraordinary trouble at the instance of the parties, to effect the taking of the recognizance, or where there are other circumstances in the case which afford reasonable ground for a further charge.

JONES, D. F. now shewed cause against a rule obtained by Sir *Wm. Owen*, calling on the Commissioner, who took the recognizance of bail in this cause, to refund the sum of 8*s.* part of 10*s.*

And where more had been received by him by the voluntary payment of the bail, a rule obtained, calling on him to shew cause why he should not refund the extra money, discharged with Costs.

In cases where such an application would be entertained, it must be made by the party who has paid the money.

paid

paid to him for taking such recognizance, with the costs of this rule.

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WATSON
v.
EDMUNDS.

It was moved, on the 4 & 5 *Wm. & Mary*, c. 14. s. 4, which enacts, that for the taking of such recognizances, the person empowered to do so "shall receive only the sum of 2s. and no "more."

The cause shewn was, first, that the money had not been paid by the defendant, but by his bail; for which the case of *Nunn v. Powell(a)* was cited, where it was held, that money deposited by bail, of any other person, in the name of a defendant, must be paid to the person so depositing it: and, secondly, that the payment was voluntary.

It appeared by the affidavit of the Commissioner, filed in opposition to the motion, that when the bail called at his house in *Birmingham*, to procure their recognizance to be taken, he was from home, at a distance of nine miles, and on being sent for specially, he returned on purpose, the bail having waited three or four hours for his return;—that when he had taken the acknowledgment of recognizances, one of the bail addressing him, said, your charge is a guinea, and asked him to take a pound, as there were two, and the case was a hard one, which he consented to do.

Under such circumstances, the Court (observ-

(a) 1 Sm. Rep. 13.

1817.
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v.
EDMUNDS.

ing that they considered this a harsh application) said, that if there had been nothing else in the case than the mere demand of 10*s.* for taking the recognizance, there might have been some ground for the motion: that they should always hold it a duty to interfere in cases where attempts at extortion should be shewn; whereas, on the other hand, they would protect persons holding offices, from being harrassed by groundless applications against them, as they held the present to be, where it was plain that extraordinary trouble had been taken by the Commissioner to serve the defendant. They observed also, that the application, if there had been any foundation for it, should have been made by the bail, by whom the money had been paid.

Per Curiam.

Rule discharged,

With Costs.

In

In the Matter of insupers set upon JOHN BROMLEY and WILLIAM BAYLIES, joint Collectors of Taxes for the Parish of WELFORD.

1817.

Friday,
14th November.

WILLIAM Baylies had obtained an order in *Michaelmas* Term, 1814, which was afterwards made absolute (as far as regarded him) that the *Attorney-General* should shew cause, in a week after service of the said order on the solicitors for the affairs of taxes, why the insupers in the said order mentioned should not be discharged, so far as regarded the said *William Baylies*, and all process thereon stayed: and why the sum of 5*l.* 5*s.* 3*d.* and 110*l.* 11*s.* 1*d.* paid by the said *William Baylies* into the hands of the then sheriff of *Gloucester*, should not be returned to him by the said sheriff. A copy of the order was directed to be served on the clerk to the Commissioners of taxes, acting for the division where the said parish of *Welford* is situate.

A joint collector of taxes is liable for any deficiency in the collection for the year, in the amount received by his coadjutor, although he has not himself collected during the time, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted or received a share of the poundage at any time.

And the Court will set insuper on him, although a re-assessment have been made on the parish, and the amount of the deficiency collected, and paid over to the receiver-general.

Jervis moved, last *Trinity* Term, on behalf of the inhabitants of the parish of *Welford*, that that order should now be discharged.—That motion was founded on affidavits, stating, that though the order of 1814, was served on the clerk to the Commissioners of the district in which *Welford* is situate, and upon the solicitors for the affairs of taxes; yet neither of them apprized, either directly

And if he should have procured a rule to be made absolute for discharging a former insuper, and for the restoration

of the money levied under it by *distringas*, without having served the order nisi on the parish, the Court discharging such a rule, will do so, with Costs.

1817.


In Re
BROMLEY.

or indirectly, any of the tax payers of *Welford* of their having been served with the said order, so as to give them an opportunity of shewing cause; that *therefore* the same was made absolute.—That although the said orders were made in *November* and *December* 1814, the tax payers of the said parish of *Welford* had no information thereof *until the month of January, 1817*, when the tax Commissioners of the district made a re-assessment on the parish for the deficiency.—That such re-assessment was opposed by the said tax payers, at a public meeting of the Commissioners, in *February* 1817, but that after a hearing, nothing was definitively concluded upon until the month of *June* following, when a re-assessment was made accordingly, under which the arrears had been collected and paid over to the receiver-general for the county.—That previously to and from the year 1804, until *December* 1808, the said *John Bromley* and *William Baylies* were acknowledged and considered by the inhabitants of the said parish of *Welford* as joint collectors of taxes for the said parish, and that the notice was as usual posted of the door of the church of the said parish in each year, of the said *John Bromley* and *William Baylies* being so appointed collectors.—That at or about *Michaelmas* 1808, when the taxes for the preceding half year had become due, the said *William Baylies* deducted what was calculated to be due to him for salary or poundage as such collector, from the amount of his own taxes then due from him as an inhabitant of the said parish of *Welford*.—That after the decease of the said *John Bromley*,

1817.
In Re
BROMLEY.

Bromley, (which happened in *December* 1808), the said *William Baylies* observed to *Joseph Marshall*, an inhabitant of the said parish, that as he, the said *William Baylies*, was a collector with *Bromley* at the time of his decease, he the said *William Baylies*, would collect the taxes for the then current half year, and then he would be sworn in as collector jointly with the said *Joseph Marshall*; and that in or about the month of *June* 1809, he was sworn in with the said *Joseph Marshall* a joint collector of taxes for the said parish of *Welford*.—That the estate and effects of the said *John Bromley* were, some time after his decease, sold to satisfy the arrears of taxes due from the said collectors, but that there remained a deficiency after such sale, and that a writ of *distringas* was issued out of this Court against the said *William Baylies* for such deficiency.—That *Edward Hodges*, another inhabitant of the said parish of *Welford*, in the beginning of the year 1808, was at the house of the said *William Baylies*, he (*Baylies*) made certain observations to him respecting the taxes (the amount of which was in effect an acknowledgment of his being a joint collector with *Bromley*, of whom he expressed disapprobation as a coadjutor, *for that he assumed too much*, and of his having acted and received a share of the salary);—and that the said order of the 15th day of *November* 1814, had been obtained upon the affidavit of *William Baylies*, stating, *that he had been appointed such collector as afore-said for the year ending 5th April* 1819, *wholly without his knowledge or consent, and had always*

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 In Re
 BROMLEY.

absolutely refused, and wholly objected to collect the said taxes along or in conjunction with the said John Bromley, and that he had not received any part of the said taxes (except as mentioned in the said affidavit).

Therefore, and in as much as no opportunity had been given to the inhabitants of the said parish of *Welford*, to shew cause against the said orders, it was prayed that they might be discharged, and that the said *William Baylies* might pay back to the present sheriff of *Gloucestershire* the said sum of 5*l.* 5*s.* 3*d.* and 110*l.* 11*s.* 1*d.* which were refunded to him in obedience to the said order, and that in default of his so doing a writ of *distringas* might issue against him for levying the same, and that he might pay the costs of the application.

The Court granted the rule on these grounds, and ordered that copies of this order should be served upon the solicitors for the affairs of taxes, the clerk to the Commissioners of taxes for the district in which the said parish of *Welford* is situate, and upon *William Baylies*.

Martin now shewed cause, on affidavits of *William Baylies* and others, stating that *Baylies* had been nominated at a vestry in 1807, joint collector of the taxes with *Bromley*, not only without his consent, but that he had himself on that occasion, after expressing his dissent at the same time, made an entry in the parish book of the names of two other persons, as joint assessors and collectors

collectors of the taxes, which entry still remained in the said book;—that finding by the information of his neighbours that *Bromley* was dangerously ill, he enquired and found that he had collected taxes to the amount of 300*l.* which then remained in his hands, when, having convened a meeting of parishioners by public notice, given in the church in the usual manner, proceedings against *Bromley* were determined on, for the security of the parish, and thereupon he procured the crown process to be issued against *Bromley's* estate and effects, which were sold to satisfy the arrears to an amount which still left a deficiency due from *Bromley* in respect of the taxes.—The affidavit then (referring to the levies made on *Baylies*, and the orders to refund) stated, that at a vestry meeting held in *February* 1817, for making a re-assessment on the parish, after *Baylies* and other persons had been examined on both sides, on oath, by the Commissioners then present, and in the presence of the inhabitants and tax payers who attended the meeting for the purpose of appealing against such re-assessment, and the business had been thoroughly investigated for two days, the Commissioners being perfectly satisfied, directed a re-assessment, which was accordingly made and signed—and that the arrears had been since collected under that re-assessment, and paid over to the receiver-general.

1817.

 In Re
 BROMLEY.

It was therefore contended, that under these circumstances *Baylies* was not liable to make good the deficiency occasioned by *Bromley's* default:
 for

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In Re
BROMLEY.

for he had not been in fact appointed, and his nomination was not only against his consent, but a subsequent nomination had been made. This Court has held, that a mere nominee who does not act as collector, is not liable for deficiencies.

What had been ultimately done by *Baylies* was submitted to have been only such an interference as any one of the other tax-payers might have taken on himself, on behalf of the rest, without becoming subject to an insuper. And the fact of a re-assessment having been made on due investigation, was much pressed.

Jervis, in support of the rule, relied on the facts stated in the affidavits filed on making the motion, which he submitted shewed such a recognition by *Baylies* of his appointment, as made him liable, and that he was not discharged by any of the circumstances relied on by him.

RICHARDS, *Chief Baron*. I am glad that this discussion has taken place. It is a common practice for one collector to leave the business to be done altogether by the other. But here it appears that they both acted together, and for several years. No objection was at any time made by *Baylies* on the ground of the insolvency of *Bromley*, but he complains only of his assuming too much. There is no doubt that *Baylies* was appointed collector on the particular occasion, or that he knew of the appointment, for he proposes to another person that he should join him as collector. It is true that *Bromley* may have always received
the

the taxes, for he was the acting collector. On the death of *Bromley*, however, *Baylies* himself acts, and the only question is, whether he is, under all the circumstances, liable for any deficiency in the collection made during the life of *Bromley*. I think he certainly is, unless he could make out a much more satisfactory case than he has done; for, generally speaking, all persons who are appointed collectors, are responsible for the others, whether they receive the taxes or not: and it is any thing but an excuse that they have never themselves actually collected.

1817.
In Re
BROMLEY.

I think this, therefore, a clear case, and the affidavit of *Baylies* is nothing like an answer to the application.

As to the fact of the former rule, moved for by *Baylies*, having been made absolute, I can only say, that I am sorry for it; for by his affidavit, although it did not state the facts fully and fairly, there appears to have been no ground for the application. Due notice of that rule had not been given to all the parties interested in it. Then there was besides great delay in lying by after the rule was obtained. The parish, on the contrary, have used all due diligence, and therefore I think the rule obtained by *Baylies* should be discharged, with Costs.

GRAHAM, *Baron*.—We have often discharged the insuper (where, of two collectors who have been appointed, only one has really acted) as
against

1817.

 In Re
 BROMLEY.

against the other; but here *Baylies* admits that he has acted on some occasions in the collection of the taxes. Whether he was sufficiently formally appointed or not, does not matter. He demanded his share of the salary, and actually collected, as he was entitled to do, on the death of *Bromley*.

On the last application made by *Baylies* to this Court, although it is true that the solicitor of taxes had notice, yet that was not notice to the persons ultimately chargeable, and who were entitled to be afforded an opportunity of shewing cause. But the tax-payers were long kept in utter ignorance of all the proceedings, and as soon as *Baylies* acts upon the order, they come to us to discharge it.

Wood, Baron, of the same opinion. There have been many applications granted for discharging insupers where they have been set on one, who, though appointed with others, has never acted, or in any way recognized his appointment. But here *Baylies*, whether formally appointed or not, accepted the office, and he actually collected. Then, can any thing be stronger in proof of his acknowledging himself collector, than the fact of demanding half the poundage.

Garrow, Baron, expressed himself to be of the same opinion for the reasons given.

Per Curiam.

Rule absolute,

With Costs.

WHITE

1817.

Monday,
17th November.

WHITE v. THOMAS.

PARKE, J. moved to justify, as bail in this cause, certain persons, living at *Plymouth*, by affidavit.

A defendant usually residing in the country, arrested in *London*, in a town cause, may justify bail by affidavit.

WILDE, J. opposed the justification, on the ground, that the defendant had been arrested in *London*, in a town cause, and therefore he submitted that the practice would not admit of a justification of bail (being persons living in the country) by affidavit; and, were it allowable, it would afford a defendant an opportunity of delaying the plaintiff in all cases by so doing, which would be constantly resorted to.

GARROW, Baron. The reason is certainly with what has been done. (Referring to the Master, he certified, that it had been done, and was not without precedent.)

The Bail were therefore admitted.

IN

IN THE EXCHEQUER CHAMBER,

(IN EQUITY.)

Coram RICHARDS, LORD CHIEF BARON.

1817.

Monday,
17th November.The MINOR CANONS of ST. PAUL'S v. CRICKETT
and others.

The term *Rent*, as used in the decrees made under the stat. 37 H. VIII. c. 12. relating to tithes in *London*, means the rent, properly so called, actually and *bona fide* reserved, without fraud or covin, and not the annual value of premises let—the rack rent.

And fines (to whatever amount) paid on the renewal of leases of dwelling-houses, are not to be considered as increase of rent, or to be taken into calculation, in estimating the amount of the tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let.

The 2s. 9d. in the pound therefore is to be paid on the amount of such rent only.

THE plaintiffs prayed by the present bill an account of tithes: claiming as parson of the parish church of *St. Gregory*, a right to demand from the defendants, who were the occupiers of a dwelling-house in the parish (as the executors of their testator the original defendant), a sum of 2s. 9d. in the pound, for the tithes, according to what they submitted was the true construction of the decree under the 37 Hen. VIII. c. 12, which, they contended, had rated the tithes on the improved annual value of such houses, to be estimated by the last increase of the usual fine on renewal, and that they were not to be paid merely on the old, and accustomed rent, or the rent actually, and in fact reserved independently of such fine.

The facts of the case were as follows:—The defendants' testator, *Crickett*, had occupied the premises, for which the increased tithes were now sought, under a lease from the *Dean and Chapter of St. Paul's*, granted to him on surrendering a former lease, whereby there was reserved a rent of a yearly capon, in consideration of such surrender, and of his paying them a yearly rent

of


of 1*l.* 2*s.* 6*d.*, and a fine of 30*l.* It did not appear that any other or larger rent had ever been paid for the house in question, which, it was admitted, was, at the time of instituting this suit, of the annual value of from 30*l.* to 40*l.*, to be let by the year; and it was also admitted, that the amount of the fines which had been paid from time to time, in consideration of the former renewals of the leases, had been constantly increased. *Crickett* had afterwards purchased, and at the time of filing the bill was seized of the freehold of the dwelling-house in question.

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 The
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 CANONS of
 ST. PAUL'S
 v.
 CRICKETT
 and others.

Wetherell and *Hall*, for the plaintiffs, contended, that, under the fair construction of the statute and decree, they were entitled to take the tithes at a rate of 2*s.* 9*d.* in the pound upon the *full annual VALUE*: that the fines usually paid on the renewal of leases, although not paid in consideration of a *diminution* of the previous rent, were in effect what would amount to nearly the same thing in its operation to injure the incumbent, namely, a consideration for *not increasing the future rent*; and were therefore fraudulent and covinous within the meaning and intention of the act of parliament; which (they observed), it should be borne in mind, was passed expressly for the protection and benefit of the clergy of *London*. Such fines are, as it were, a payment of future rent by present anticipation, and those fines are increased on every renewal, in proportion to the increase of the annual improved value of the houses let. That appears from the pleadings, and is in fact admitted. The reading of the second clause of the decree demonstrates, that

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The
MINOR
CANONS of
ST. PAUL'S
v.
CRICKETT
and others.

that *rent* is there used synonymously with *annual* VALUE; and such construction is authorized by the decision in the case of *Antrobus v. The East India Company* (a), where the Master of the Rolls said, that, in the case of *Grant v. Cannon* (b), the Court considered the word *rent* in the statute as to be understood in the double sense of "reserved" or "estimated rent;" and his Honor adopted that construction in the case then before him. The second clause distinguishes expressly the rent actually reserved, from the rent which the tenant had been accustomed to pay, and points out how the calculation is to be made, with a view to obviate the consequences of such an arrangement as the present, which it was foreseen might be resorted to, to diminish the revenues of the church: or otherwise a fine equal to the value of the fee might be taken, which would deprive all future incumbents of tithes for ever. When this question came before Lord Rosslyn, in the case of the *Canons of St. Paul's v. Crickett* (c), it was not maturely considered; but the law on this subject has been subsequently better understood, and the whole doctrine has undergone much change since the case of *Dunn v. Burrell* (d), and particularly in the result of the case of *Antrobus v. The East India Company*: and, were it otherwise, they submitted that it would tend greatly to impoverish the revenues of the future clergy of *London*; that it was manifest that such was the object of the fines, from the circumstance, admitted, of their having been

(a) 13 Ves. 9.

(b) 2 Ves. 563.

(c) 1 Gw. 299.

(d) 2 Gw. 541.

increased

increased on the various occasions of renewing the leases.

1817.

 The
 MINOR
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 V.
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 and others.

Agar and *Shadwell*, for the defendants, contended, that on the words of the decree, and the authority of the cases of *Skidmore v. Bell(e)*, *Dunn v. Burrell*, and *The Canons of St. Paul's v. Crickett*, the decision of the Court must be in favor of these defendants, who could not be called on to pay more than after the rate of 2s. 9d. in the pound on the rent, *quá* rent, actually reserved annually, without fraud or covin. The statute has not, as has been urged, distinguished between the rent reserved, and the rent fairly due generally; for the only distinction there made is expressly confined to two cases, and those are, where a *less* than the accustomed rent has been reserved, and where *no apparent* rent is reserved, for purposes of fraud or covin. The attention of the persons appointed by the legislature having been drawn to such cases, there is therefore no ground for surmising that the decree intended any thing which it has not expressed. It has provided, that if less rent shall be taken than has been accustomed to be reserved, the payment of the tithes shall not be thus eluded. It is therefore attempted to be contended, that it must be construed as enacting, that if *more* be not reserved, the tithes shall still be increased. That is, however, clearly not so. The statute intended, that the tithes should not be diminished, not that they should be posi-

(e) Co. Int. 659.

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tively increased. A strong fact in favor of the defendants is, that it is well known to have been anciently the custom, for ecclesiastical corporations, long before the passing of the act, which authorized this decree, to make leases reserving rents certain, in consideration of fines, which might at that time have been augmented to an amount corresponding with the duration of the term; and terms might before the 13th of *Eliz.* have been created for any number of years. It was probably that custom which the decree had in view, when it resorted to the criterion of rent as a measure for rating the tithes, lest it should be carried so far as to lessen even the rent which had been previously reserved. That custom it was, which produced the restraining statute (13 *Eliz.*), whereby, for the sake of the church revenues, spiritual corporations were restricted from letting for more than twenty-one years, and were compelled to reserve a rent equal to that at which the premises were before let.

They contended, that the decisions were also in favor of the defendants; and submitted therefore that there was no foundation for the present suit either on principle or authority.

Wetherell, in reply, insisted that the increasing the fine, rather than the rent, was precisely the letting by fraud and covin intended by the decree to be met and defeated, and therefore the fine ought to be considered as *quasi* rent, and should be taken into the estimation of the annual rent,
because

because but for that, the rent would have been proportionally increased; for had not such fines been paid, there is no doubt but the rent would have been in the same degree raised in point of fact.

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RICHARDS, *Chief Baron*. Having stated the pleadings and the facts,

This claim of *The Canons of St. Paul's* is made under a decree founded on an act of parliament of the 37 H. VIII. c. 12*, upon the construction of which very many questions have of late years been raised that have given rise to several decisions, of which there are none precisely applicable to the present case, except that of the same name in *Vesey*.

The defence is, that *Crickett* held this house on a lease, under *The Dean and Chapter of St. Paul's*, at a rent thereby reserved of 1*l.* 2*s.* 6*d.* per annum, and that he is not liable to any thing more than 2*s.* 9*d.* in the pound on that rent. There were also fines paid from time to time on renewal; but there has been no attempt made to prove that a larger sum has ever been paid for the house in the way of rent than this sum of 1*l.* 2*s.* 6*d.*

Now the whole question turns on this single point, whether the word "rent" in this decree, is to be construed, as including the fines customarily payable on the renewal of these leases, and whe-

* That decree is to be found, at length, in Burn's *Echl. Lay*, vol. iii. p. 555.

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ther *The Canons of St. Paul's* are entitled to be paid the sum of 2s. 9d. in the pound upon the improved annual value, as measured by the amount of such fines.

There have been many cases wherein it has been properly decided, that the term "rent" is used with a distinction from the general acceptation of it, and on some occasions the word "rent," as employed in some parts of the decree, has been considered as synonymous with the words "annual value." In this case, however, I have no doubt that the word "rent" cannot be construed to mean "annual value;" for the words of the decree are "where any lease is or shall be made of any dwelling-house, &c. by fraud or covin, reserving less rent than hath been accustomed or is: or where any such lease shall be made without any rent reserved upon the same by reason of any fine or income paid before hand: or by any other fraud or covin, in every such case the tenant or farmer shall pay for his tithes of the same after the rate aforesaid, according to the quality of such rents as the same were last letten for, without fraud or covin, before the making of such lease." In that view therefore it can only be taken to mean simply the rent actually reserved, and not the possible, annual value.

The argument used for the plaintiffs however is, that "rent" here, where a large fine is part of the consideration, must be construed as tantamount to the annual value, and that it must be estimated by the measure of the increased fine;
 for,

for, it is said, if a tenant should pay a large fine on entering under a lease, it may be considered by way of metaphor as an anticipation of rent. But that argument is overthrown by the authority of *Dunn v. Burrell* (f), which was a case much considered, after having been argued by Serj. *More* and Sir *H. Finch*, who were very considerable men at that time. After the first argument the Lord Keeper doubted whether that "imitative" rent, as it was very properly called, was within the evil of the act. In that case the old rent reserved was made payable by the lease, and also a further sum expressly by way of *fine and income*. It was a lease for five years, at 5*l.* per annum; and it was also covenanted that the lessee should pay 150*l.* *in the name of a fine and income by several future payment of 30*l.* each, to be paid at the same feasts at which the rent was reserved to be paid.* On the first argument the Lord Keeper said, that there was no colour to bring the reservation within the clause which speaks of the reservation of no rent, or of a less rent; but the only question is, whether this "imitative rent" be a rent within the body of the act? Now, certainly, that was a case of a fine or income reserved, and so reserved as that it was much more like rent than the present fines, yet we have Lord *King's* authority, that even that "imitative rent" was not within the clause. Then, after the second argument, it was agreed by the Lord Chancellor and the other assistants, that 25*l.* per ann. *reserved by way of fine and*

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(f) Gw. 299.

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income

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income, was not *rent*. I hold myself therefore *a fortiori*, bound to consider that these fines are not, properly speaking, *rent*. They are not recoverable by the summary mode of distress, and want other incidents which belong to the nature of *rent*. Now *Crickett* has clearly paid a *rent* of only 1*l.* 2*s.* 6*d.* Then the decree says, that where a lease is made by fraud or covin, reserving less *rent* than hath been accustomed or is, the tenant shall (in that case) pay for his tithes according to the quality of such *rents* as the same were last letten for, without fraud or covin. Now is this a less *rent* than had been accustomed or was? or is there any fraud or covin shewn? Fraud and covin is not charged; and if it were, without proof, I could not infer it. In point of fact there might even have been under many circumstances a less *rent* reserved than had been accustomed, without fraud or covin. It is stated in the answer to have been always of the same amount, and there is very great weight in the argument used by Mr. *Shadwell*, that, before the time of Queen *Elizabeth*, probably as far back as *Henry* the Eighth, ecclesiastical leases were frequently made in consideration of fines; and the *rent* of this house may have continued the same from that time to the present on that very account. The fines, in those cases, were so much money in the pocket of the parson; and if so, there could be no fraud or covin on the part of the lessee; and as between the lessor and the lessee that ought to be fully proved, before it should be allowed to have any weight in argument.

It

It is however quite clear from the case of *Dunn v. Burrell*, that such leases are free from fraud and covin, within the meaning of this decree. Here undoubtedly the rent reserved is considerably less than the annual value; but it is as clearly not less than the rent accustomed to be paid. On the ground of fraud and covin therefore the plaintiffs cannot succeed.

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It would have been more correct if *Crickett* had given evidence as far as he could of the allegation in his answer, that the rent alleged by him to have been paid, amounted to as much as had been paid before, because, as the *Minor Canons of St. Paul's* stand in *loco rectoris*, they will be entitled to demand an issue on that fact; and this Court cannot now decide on that, because he has given no evidence.

If this case had stood on the authority of that of *Dunn v. Burrell*, and the construction which I put on this decree alone, I should have considered myself bound to decide for the defendant: but when I find this case in *Vesey*, between the same parties, coming before Lord *Rosslyn*, under circumstances very similar, I can have no doubt. In that case, as here, the defendant *Crickett* alleged, in his answer, that he had never heard of a greater rent being paid than that which was paid by him, and on that, the decree in his favor proceeded; and what makes that case still stronger, is the circumstance of the other defendant failing, because he had not made the same defence. That

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case was argued by the Attorney and Solicitor-General of that day, on the part of the plaintiff, and they were not persons likely to give up any point which could be urged in his favor; yet they felt, that, if the defence were proved by evidence, it must succeed, except that the plaintiff might still require an issue to ascertain at what rent the premises were last let for, before the date of the defendants' lease, which was in effect admitting the defendants' answer, and therefore abandoning the point,

[His Lordship then went more particularly into the case cited, and stated that he considered it precisely in point.]

I am of opinion, therefore, that the defendants' construction of the decree is correct as applicable to this case; and I cannot but consider myself bound by the authority of the old decision in the same cause. The bill therefore must be dismissed; and, as in the case before Lord *Rosslyn*, and on the same grounds, with costs.

Bill dismissed,

With Costs.

IN

IN THE EXCHEQUER CHAMBER,

Coram RICHARDS, LORD CHIEF BARON.

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Monday,
17th November.WILLIAMSON, Clerk, v. Lord LONSDALE and
others.

THE plaintiff filed this bill in his character of vicar of *Kirkby Stephen (Westmoreland)*, for an account of the tithes of turnips and potatoes, and agistment, from the defendants, occupiers of lands in the parish,

A modus of one penny payable at *Martinmas* by every owner of a garden, or garth, within the parish, called a garth-penny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips, grown in gardens, is a good modus.

Their defence was founded on the following moduses:

One penny payable at *Martinmas* by every owner of a garden, or garth, within the parish, called a garth-penny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips, grown in gardens.

A modus of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage, within the said parish, for and in lieu, and satisfaction of, all small prædial tithes arising, &c. upon lands so in tillage, as covering field turnips and potatoes, is bad.

A modus or yearly sum of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage, within the

ing, &c. upon lands so in tillage, as covering field turnips and potatoes, is bad.

A modus of 15s., payable on *Easter Monday*, by all the occupiers of land in the township, &c. or some or one on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment,—if there be evidence given of its having been paid, and for the tithe of agistment,—will be sent to an issue; for notwithstanding that species of tithe has been not demanded, or recognized till of very late years, yet as it is in fact as old as that of hay; *non constat*, but that it may have been not so neglected before time of memory, and there is therefore no ground for saying that it may not so long ago have been compounded for; for which reason the Court will not decree an account of such tithe on the ground of the anachronism; where there is strong evidence of the payment, without further inquiry.

Consumption of titheable articles in the family of the land occupier, is not a ground of exemption.—*Quære* as to green peas.

said

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said parish, for and in lieu, and satisfaction of, all small prædial tithes arising, &c. upon lands so in tillage, as covering field turnips and potatoes.

A modus of 15*s.*, payable on *Easter Monday*, by all the occupiers of land in the township of *Winton*, or some or one on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment, and

The same for two other townships.


In pleading the moduses, the answer stated, that the defendants "insist and hope to be able to prove that," &c.

Some of the defendants also set up a defence, on the ground of the turnips and potatoes, of field produce, being consumed entirely in their families.

In support of the several moduses the defendants proved the money payments, and the non-perception of the tithes sought either in kind, or by temporary composition, as far back as living memory and reputation could carry them: and the plough-penny they proved to have been uniformly paid by all the occupiers of lands within the parish.


It was in evidence that the plaintiff and his predecessors had constantly received the bulk of the small tithes in money payments; and, on the part
of

of the defendants, it was proved, by the depositions of many witnesses, that there were certain moduses and customary payments, called the garth-penny and plough-penny, due and payable by all and every the tenants and occupiers of dwelling-houses and lands in the parish; the garth-penny in lieu of the tithes of herbs and fruit growing in their respective gardens and orchards, whether or not the same were connected with other lands; and the plough-penny by the occupiers of lands, for and in lieu of the tithes of every thing produced by the plough upon the said lands, except corn and grain, and whether such lands shall or shall not then be ploughed or in cultivation. Customary payments were also proved to have been made during memory for the tithe of grass whether mown, made into hay, or eaten by barren cattle; and that the payments of the moduses for that tithe were contributory among the owners of cattle-gates and other lands within the township, and that nothing had ever been paid for agistment, or for turnips and potatoes.

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Dauncey and Hall, for the plaintiff, submitted, that as the vicar had established his *prima facie* title to all the tithes, except corn and grain, the question would be, whether the defences were made out? The garth-penny they did not dispute.* The plough-penny they objected to, as being uncertain as to what tithe it was payable in lieu of, and by whom it was payable, or what quantity of lands it covered with respect to each, and in the amount

* Vide *Layng v. Yarborough*, ante, vol. iv. p. 383.

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of the payment. This kind of modus (they contended) was one which was called in the books a leaping modus, as it must ever be varying, and never could be fixed or certain; and therefore such a modus has always been held to be bad. It might be in one year one penny for all the lands in tillage, and in the next 1000 pennies. And they cited *Turton v. Clayton (a)*, where the payment of a penny for tithe of hay was held to be bad for that reason. A vicarage would be incapable of being valued where such moduses prevailed; and so unreasonable and uncertain a commutation never could have been acceded to. They also cited *Blackburn v. Jepson (b)*, in support of the objections, and particularly as establishing that 4*d.* payable by each occupier, having lands cultivated by the plough, &c. was bad for uncertainty.

They objected further, that the moduses were ill pleaded; for it was not alleged in the answers, that there had been in point of fact a customary payment made in lieu of the tithes in dispute; but the defendants had merely said, "they insist and hope to be able to prove" that there hath been and payable, and that they submitted was not such a positive allegation of the matter of the defence as was necessary in pleading.

They next submitted, with respect to the laying of the plough-penny, that there was a variance between the modus as laid in the answer, and the payment as proved by the depositions, so that the

(a) Bunb. 80, and 2 Gw. 628.

(b) 17 Ves. 473.

defence

defence was not supported by the evidence: the allegation being, that the modus is payable by the several and respective occupiers of the lands in tillage, arising, &c. "on lands so in tillage;" whereas the proof is, that it has been paid by the occupiers of lands (generally), whether in tillage or not, for and in lieu of the tithe of every thing produced by the plough, making it in effect a personal payment. In support of that objection they cited *Scott v. Fenwick* (c), *Bishop v. Chichester* (d), *The Warden and Minor Canons of St. Paul's v. Morris* (e), and *Blackburn v. Jepson* (f). And they suggested that it might be a mere eleemosynary payment to the church, without having reference to any particular article, although the defendants, taking advantage of the name, had chosen to call it a modus covering the productions of plough lands. *Cowel*, in his *Interpreter* (g), describes plough-penny as being an *eleemosynary* payment, and that such payments are personal, and are payable *de qualibet caruca juncta inter pascham et pentecosten*. And they cited a dictum of Mr. J. *Chambre*, who held, on the trial of an action in *Westmoreland*, in 1811 (h), where a plough-penny was set up as a defence, and was stated to be in lieu of turnips and potatoes, that such particular prescriptions should be proved to be applicable to the tithe sought to be covered by them. Lastly, they contended, that the modus pleaded for grass in the township, was, if it could be proved, a mere hay mo-

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(c) 3 Gw. 1252.

(d) 4 Gw. 1316.

(e) 9 Ves. 164.

(f) 17 Ves. 477, 8.

(g) Title Plow-alsms.

(h) *Phillips v. ———*.

dus,

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dus, and could not be held to cover agistment ; a tithe never demanded till modern days, to which the payment could never at any time have been applied, and of which for the same reason perception could not have been enjoyed, or be proved on the part of the vicar.

With respect to the defence set up, of the turnips and potatoes, grown in fields, being consumed in the families of the occupiers, they contended, that it was not founded on law ; for that there did not exist any such ground of exemption from tithes, or if there were any such, it would hardly apply to such quantities as were produced in fields, and as a fallow crop for wheat, as in this case.

Fonblanque, Martin, and Spranger, for the defendants, in answer to the objections taken to the laying of the modus of the plough-penny, submitted, that that which had been directed to the terms of the answer in alleging the modus, was rather matter of exception to the sufficiency of the answer, than applicable to the questions in the cause at the hearing.

As to the point made of its being a fluctuating modus, and liable to diminution in amount, they insisted (on the authority of *Bennett v. Read* (i)) that the objection did not apply ; for there the same objection was taken to the tithe being payable by each householder, that the number of householders might be reduced to one, yet in that case the Court (adverting to Lord *Hardwicke's*

(i) 4 Gw. 1290.

words in *Hardcastle v. Smithson* (k),) said, on the point of the uncertainty of the recompence, and its possible reduction in value,—that the answer given to it at the bar was the true one. The recompence is certain to a common reasonable intent, and more is not required. The possible reduction of the number of inhabitant householders is too remote a consideration. And the fluctuation (as was said by the Court in *Bennett v. Read*) may operate in favor, as well as to the disadvantage of the vicar. Thus both the objections are answered, in that case, by the Court. Here the recompence is certain, though not in amount; and in fact the argument of possible diminution of the amount would apply to all sorts of titheable matters; for there is no vicarial tithe which may not be diminished by some means or other, as by converting the soil to other purposes.

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As to the commutation being unreasonable, that is also answered by the Court in the same case; for *Eyre*, Baron, there says, “it is no part of our consideration whether it be sufficient in value. That was the concern of the original contractors: we have only to see that the contract is sufficiently precise and certain.”

With respect to the alleged variance between the answer and the evidence, if there be any, the proof has enlarged the vicar's right, and shews the modus to be more advantageous to him, though it is substantially the same.

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The case of *Blackburn v. Jepson* they distinguished from the present, as not in point on the question of the plough-penny, as objected to by the counsel for the plaintiff; because that modus was held to be bad, solely because there was no averment of what quantity of land a plough consisted, and for no other reason, whereas that objection does not arise here.

The point raised by the defence, whether potatoes and turnips consumed in the family were exempt, they submitted had been too lightly passed over by the counsel for the plaintiff; for the authorities on that subject are strongly in favor of the defendants. Dr. *Burn* notices the exemption in the case of peas (*l*), and in Ro. Abr. 647, (A.) pl. 11, the same doctrine is to be found; and if peas are exempt as garden stuff, why not every thing *ejusdem generis*;—for that is the ground on which vicars themselves claim tithes of articles of modern introduction—on the principle of their being consumed at home. There is also another dictum to be found in the same book (*m*); where it is said, that for sheep fed on a man's own land, and afterwards eaten in his own house within the parish, he shall pay no tithe.

[RICHARDS, *Chief Baron*. I cannot consider that to be law. I do not see the distinction; for if peas are exempt when consumed at home, why should not the same exemption extend to corn; and if to sheep, on the same principle, why not

(*l*) Eccles. Law, vol. iii. p. 436. and Ib. p. 642, (S.) pl. 5 & 6.
“Nota per custome.”

(*m*) Ro. Abr. p. 647. pl. 10.

to oxen and other animals. If it be confined to any specific matters, I shall certainly not be disposed to carry it further.]

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To obviate the objections raised in argument to the modus for agistment, the defendant's counsel suggested, that the modus was not set up as covering the specific thing *eo nomine*, but as being included in the term "grass," which (they submitted) was equally protected by it, whether mown and made into hay, or eaten: and they urged that as such a modus was neither illegal nor uncertain, and as the payment had been proved, and to have been made by occupiers who had no hay, but merely pasture, and as no perception had been shewn, the Court should give the defendants an opportunity of inquiring further into the nature and object of a payment made for so long a period.

Dauncey, in reply, repeated his former objection to the manner of introducing the modus in the answer by the defendant, without stating whether they believed in the existence of the modus pleaded: but

The *Lord Chief Baron* over-ruled it; holding it to be sufficient to let in the evidence on—that if it were not, it was now too late (at the hearing) to make any such formal defect matter of objection—and that exceptions should have been taken to the answer when it was filed, if it had been thought insufficient in that respect.

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He then contended, that the plough-penny was eleemosynary, and nothing like a modus in any respect. He opposed to the authority of *Bennett v. Read* the case of *Travis v. Orton* (o), and the decision cited above in *Blackburn v. Jepson*.

He denied the law of the exemption set up for potatoes and turnips on the ground of family consumption, and contended, that the strong instances adverted to were rather exceptions, proving the rule to be the other way, than cases establishing the doctrine, and that they rested on no principle of any kind, or if well founded, it must extend to all other titheable articles, when consumed by the family.

On what was said as to the grass moduses covering agistment, he urged, that the hay was in itself so totally distinct from agistment, both in the nature of the thing and the quality of the tithe, that a payment for either could in no sense be considered as a commutation for the other.

Adv. vult.

RICHARDS, *Chief Baron*, now delivered judgment.

This bill was filed for an account of the tithe of turnips, potatoes, and agistment: and the main defence is the several moduses which have been set up.—The title of the vicar to the tithes demanded is therefore quite clear: the only question

(o) 3 Gw. 1066.

then

then is, whether he may take them in kind, or must receive them *sub modo*, and that will depend on the evidence of the facts entirely.

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In the first place, however, the defendants insisted on an exemption from the payment of tithe for all such turnips and potatoes as are consumed in the family of the grower, but it is clear that that ground of defence cannot be maintained. I have never known any instance where potatoes, planted in small quantities about the house even, and used by the family and their cattle, were considered as exempt from tithe on that principle any more than wheat, or any other titheable matter. If there be any such exemption for green peas, it stands alone, and I see no reason for extending it.

The first of the moduses which have been set up is the garth-penny, and as that is not disputed there can be no decree for the vicar against that *modus*.

We have next to consider the plough-penny, as it is called. It is laid as payable by the several and respective occupiers of lands in tillage within the said parish, for and in lieu and satisfaction of all small prædial tithes, growing upon lands so in tillage.

The first question arising upon that is, whether it is, as stated, a good *modus* in point of law; that is, whether one penny, to be paid for all the lands which the occupier may choose to take into his

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own hands (which may extend to the whole parish) is a good modus. On that point two cases have been cited, which I confess I cannot reconcile, and I am not ashamed to say so, when I find the same inability acknowledged in the case of *Blackburn v. Jepson*, by the late Master of the Rolls, and who on that account declined to decide the question, suggesting that it would be proper in such a case (where there was doubt as here with regard to the fact of the payment, and the two decisions being at variance on the point) to do what had been frequently done under such circumstances, namely, to postpone the decision of the question of law until it shall be ascertained whether the modus exists in point of fact. I do myself think the modus very objectionable as to its legality, but that is however rendered doubtful by what was said by Lord Chief Baron *Eyre*, in the case of *Bennett v. Read*.

Then it was objected that this modus was not proved according to the terms in which it is laid. I have looked at the evidence, particularly that of *Peacock*, which was read by the plaintiff, and am of opinion that it supports the answer.

Another point made was, that this payment of a plough-penny must be taken to be merely eleemosynary, but how can I say that it is an eleemosynary gift, or treat it as if it were, unless there is evidence given to shew that there is some probability that it was, but as none is offered, I cannot order a direct enquiry to be made expressly on that point.

I think,

I think, however, the payment itself is sufficiently proved to require the aid of an issue: and I shall therefore follow the example set me by the Master of the Rolls, which I shall always be glad to do where I can, and will not give any decisive opinion on the legality of a modus, which (it not being as yet established in point of fact) may, perhaps, never come in question.

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[His Lordship, however, desired, that that point might stand over for further consideration, and that the decree should be in the mean time suspended. And in the following *Hilary* term (10th of *February* 1818) he pronounced the payment not to be a modus, and, countermanding the issue, decreed an account of the tithes.]

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 Tuesday,
February 10th.


The remaining question is, whether each of these townships pays a modus for the tithe of agistment as well as of hay. That they do in fact pay a modus there is no doubt, nor is it denied; but it is contended that that modus is paid in lieu of hay only, and does not cover the tithe of agistment. That certainly seems to be reasonable; but then there is very strong evidence on the other side, to show that it included the tithe of agistment. There is no objection made to these moduses in point of form, and there is no doubt that a contract may be entered into for both species of tithe; still the question is, whether it was entered into in point of fact. But then it has been argued that the same modus cannot be payable for both species of tithes, because agistment is a tithe not

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known, or at least not demanded till of late years. I know well, personally, that that is so, but it is nevertheless matter of argument and reasoning, merely, and the fact itself must be decided by evidence; for though it is true that the tithe of agistment has not been required to be paid till recently, yet it is a tithe as old in itself as the tithe of hay, and therefore may have been contracted for in very ancient times, but may afterwards have been neglected, till it had become almost forgotten. Here I find such evidence given on the part of the defendants as obliges me to direct an issue, for I cannot decide against that evidence without, and for aught I know they may have much more to offer.

Decree.—Issues as to all the payments, except the garth-penny: and as to that, the bill to be dismissed.

The KING in Aid of SOLLY v. ADAM.

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 Saturday,  
 15th November.  
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CURWOOD, on a former day, had obtained a rule, calling on the prosecutors of this extent to shew cause why the assignees of the defendant, who had been declared a bankrupt, should not be let in to plead to this extent, notwithstanding writs of *venditioni exponas* had issued, and why the sheriffs of *Surrey, Middlesex, and Kent*, should not be ordered to pay over the monies levied by them into the hands of the Deputy Remembrancer, to abide the event of the suit.

Where defendant's effects have been sold under a *venditioni exponas* on an extent in default of claim, it does not conclude his assignees under a commission of bankruptcy; and they will be allowed, on application, to enter their claim, and plead in a proper case where the proceedings have gone so far, on payment of costs of the sale and the application and putting the prosecutors of the extent in the same situation as if they had claimed and pleaded in due time.

The affidavit used on the motion stated, in effect, that the extent issued on the 23d of *April*, on a debt, alleged to be due on a bill of exchange, dated the 16th of *December*; but, in fact, drawn, as defendant believed, on the 14th *February*. That the commission of bankruptcy issued on the 3d of *June*, and the assignees were appointed on the 24th. That on their investigating the bankrupt's accounts, they had reason to doubt the existence of the debts. That the assignees could not have made this application before; and that notice not to pay over the money levied had been served on the sheriffs.

A short delay (as a month) is not laches in the case of assignees.

An affidavit of a former clerk of the defendant also stated some strong facts to invalidate the bill of exchange.

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Dauncey now shewed cause, relying on the following facts stated in the affidavits filed in opposition to the rule. That the writ of extent issued 23d *April*; the inquisition was taken the 14th *May*; and that the *venditioni exponas* issued on the 30th, in default of claim. That an inquisition was also taken on the 6th *June*, whereon the rule to claim expired the 14th, and a *venditioni exponas* issued on the 20th. That the effects being insufficient, another writ of extent was issued the 18th of *June*, returnable the 25th *June*, and tested the 23d *April*.—Inquisition 25th *June*.—Rule to claim expired 25th *July*, and *venditioni exponas* issued on the 26th, under which the goods were afterwards sold.

A long affidavit was also read as to the merits,

On those facts it was strongly pressed on the Court that this application was too late, even if there had been merits distinctly shewn, which, however, were negatived (it was said) by the affidavit of the prosecutor of the extent,

RICHARDS, Chief Baron. The assignees ought certainly to be let in to claim. If they have been guilty of any laches, or delay, it has not been more than a month; which, in the case of assignees, ought not to be allowed to prejudice the creditors. In such cases some delay may be unavoidable. Then they have sworn to merits; and although it is denied that they have merits, we cannot take that denial here.

The

The rule must therefore be made absolute.

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The rest of the Court concurred.

The consideration of the costs being mentioned, the Court said, that this was a case where the assignees ought to pay the costs of the application.

Per Curiam.

Rule absolute on payment by the assignees of the Costs incurred by the prosecutors of the extent on the sale of the property, and of this application; pleading *instante*, and going to trial at the Sit-tings after Term,

Sir

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Sir WATKIN LEWES v. MORGAN and others*.

1 Dow & W. 606. 118 ex 182

Settlement of
accounts be-
tween attorney
and client, not
conclusive :

the nature of
their connec-
tion, except-
ing their ac-
counts from

the operation of the general rule in equity. Therefore accounts settled and signed, and where vouchers are delivered up, and a note given for the balance, will be re-opened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of attorney and client, agent and principal ; and where the balance is in favour of the former under the peculiar circumstances affecting this case.

On taking such re-opened accounts before the Deputy Remembrancer, it will not be sufficient between such parties that bonds are produced in evidence to prove that the debt for which they were executed existed ; and the obligee will be required to give evidence of the actual payment in money of the full consideration expressed. But in a case of so great length of time, the party will be allowed to make oath of the existence of any voucher, which may not be forthcoming on re-opening such accounts.

An attorney acting as agent for the mortgagor and mortgagee, in the matter of the mortgage, and as agent and quasi banker, for the mortgagor (that is, receiving the mortgage money, and giving his accountable receipts to the mortgagor), will not be allowed to charge the mortgaged premises with a greater sum, (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by the mortgagees, on account of and as agent for the mortgagor : nor will the most minute fraction advanced by him to make up the integral sum of the mortgage money be allowed to stand as a charge on the estates.

An attorney having himself, in quality of banker to his client, received money which he has procured to be advanced to such client on mortgage of his estates by a term of years assigned, for which he gives his accountable receipts, and from which he discharges himself by money actually paid to and on account of the principal, and which appears by an account settled and signed by both parties, will yet not be allowed to charge the mortgage estates with any sum *ultra* what has been actually advanced by the mortgagees in money, although he seek to charge the estates with no larger sum than the express amount which the term is created to raise, and although there are unsatisfied judgments recovered by him against his client, outstanding at the time when the mortgagor seeks to have the possession of the mortgaged premises delivered up to him, such judgments being held not to be tackable to the mortgages.

On a bill for an account of all transactions between the parties, such account having been decreed, the Court will order, on application, if any of the transactions developed in the course of the investigation appear to warrant it, that the Deputy Remembrancer take a separate account (and report it specially) of the mortgage account, strictly speaking, and if found to have been satisfied, (however less the amount may be than the money actually advanced by the attorney) they will admit the mortgagor to redeem : or where the whole has not been satisfied, on paying what shall not have been already paid. *Wood, Baron, contra.*

Bills of such solicitor for business done, forming items in such account, are still liable to taxation.

Instruments (as bonds, &c.) will not, under such circumstances, be permitted to stand as a charge on the mortgaged estates, although expressly made part of the consideration in the mortgage deed, unless it can be shewn that the consideration of such bonds have been actually paid in money by the mortgagee to the mortgagor.

All the monies advanced by the solicitor, and otherwise due to him *ultra* the mortgage money, must go to the general personal account. *Wood, Baron, contra.*

If the attorney (being concerned as well for the mortgagor as mortgagee) have been appointed receiver of the rents and profits of the mortgaged estates, and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagees, he will be ordered to pay such balance into Court, notwithstanding the general report have not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands.—*Wood, Baron, dissentiente.*

THE various proceedings which have taken place during the course of this long protracted suit have given

* Complicated as the present case may be in its circumstances, yet as it has in effect produced from time to time, from the

given rise to the discussion of a doctrine, no where appearing in the books to have been ever before so fully

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the high judicial characters who have presided in the Court of Chancery, or sat on this Bench for upwards of the last thirty years, with only one or two exceptions, their several opinions on the extent of the jurisdiction which courts of equity may exercise, as between parties who, like these, have been long engaged in mutual dealings in characters whose connection necessarily induces confidence and subjection on one hand, and controul, influence, and opportunity, on the other; it must therefore be considered as one of great importance, and not to be omitted in a collection of exchequer cases. Those opinions, too, have been most elaborately formed, and more deliberately promulgated, than is usual in cases of unanimity. The several decisions are made much the stronger by being founded wholly on the fidelity required by the Courts from persons in the situation of professional adviser to others, by whom great confidence must necessarily be reposed in them, abstracted from and independent of the common considerations, so often forming a material part of such cases, of importance from infancy or age, imbecility of mind, ignorance from want of education, inexperience in business, and poverty or humility in condition of life,—the plaintiff now claiming the protection of the Court, being free from all such incapacities.

On the particular subject of the case therefore the present series of opinions forms an almost regular treatise; and the Editor presumes to think it may be not the less valuable, appearing as it does through the medium of a report, which adds at least the advantage of developing the course of practice, as displayed in the progress of a suit instituted for restitution of rights lost or injured by consequence of such connection; and probably the difference of opinion which has prevailed on the Bench in this Court, in most of the decisions which have been pronounced (supported as it is by the steady logical ability, for which the judgments of the learned dissentient are on all occasions so conspicuous), and which will be found to be more referrible to the facts than the law of the case, may have a tendency rather to illustrate and enforce the legal doctrine deducible from it, than to render it the weaker or more doubtful as an authority.

These observations, which the Reporter has ventured to ob-
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fully considered by the Courts, and one of the highest importance in point of law, as affecting the interests of every man of property who may be driven by the pressure of his emergencies to have recourse to a legal adviser, in a season of difficulty. As the whole case depends materially on the very peculiar situation of the parties to the suit, and the nature of their mutual transactions and dealings together, as with reference to their connection in the several relative characters, successively, of attorney and client, principal and agent, banker and customer, mortgagor and mortgagee, obligor and obligee, debtor and creditor, plaintiff and defendant, a succinct and minute detail of the history of that connection, and of those transactions becomes indispensibly necessary, both to a proper understanding of the nature of the case, and to its being called in aid as an authority; for the facts form the ground-work and foundation of all the various decisions which have been from time to time pronounced in the cause.

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In the year 1773, it was agreed between the plaintiff and defendant\* (who first became acquainted together casually on the occasion of an accidental meeting in *Wales*), that the defendant should procure for the plaintiff money (from 6 to

trude on the case, have been made with the double purpose of furnishing an apology, if not an excuse, for its length; and of directing the reader's attention, *in limine*, to the points of which he is ultimately to be possessed, in aid of the usual epitome of the case by means of the marginal reduction.

\* By "the defendant" will be meant the defendant *John Morgan* throughout.

8,000*l.*)

8,000*l.*) on mortgage of certain estates in the counties of *Glamorgan* and *Carmarthen*, of which the plaintiff was seized in right of his wife, at *four per cent.* which the defendant had professed to be able to do. That sum, when raised, was to be applied partly in discharge of a mortgage, then outstanding on the plaintiff's estates in *Pembrokeshire*, to Dr. *Kent*, for 3,000*l.* (which was subsequently encreased to 5,000*l.*) with interest at the rate of *five per cent.* and the remainder was to be paid to, or to the account of the plaintiff. In the mean time and while the defendant was endeavouring to negotiate the various loans which it was intended to procure, he advanced to the plaintiff (as he stated) a sum of 500*l.* and various minor sums at different times (alleged to be the property of the defendant's brother *Chardin*, then in the defendant's hands) to meet the expences of the plaintiff, who was at that time engaged in an election-contest for the city of *Worcester*: for all which several sums consolidated, amounting together, according to an account then taken between plaintiff and defendant, to the sum of 2,400*l.*, the plaintiff, at the end of the year, executed a bond to *Chardin Morgan*, which he delivered to the defendant.

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To enable the defendant more readily to procure the loan, the plaintiff and his wife, by lease and release (24th and 25th *March* 1775), limited and appointed their settled estates in *Glamorgan* and *Carmarthen*, to the use of *George Morgan* and *James Morgan*, two of the defendant's brothers,  
 for

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for a term of five hundred years, in *trust to raise the sum of* 12,000*l.* to pay off the said mortgage of 5,000*l.* and to keep down the interest on the money to be advanced. The defendant at that time however failed to procure any loan on the estates. In the following *May*, (the defendant being about to be married) an indenture of settlement was executed, whereby, after reciting that part of the fortune of *Amelia Farrer*, (the defendant's intended wife) consisted of 1,542*l.* and 2,154*l.* *East India* annuities, and 1,442*l.* 10*s.* three *per cent.* reduced annuities, and six *fer* office bonds for 100*l.* each; and reciting the aforesaid bonds for 2,400*l.* and 600*l.*; and that the said *East India* annuities and reduced annuities had been transferred into the names of the said *William Farrer* and *James Morgan*, it was witnessed and declared; that the said *William Farrer* and *James Morgan*, their executors, administrators, and assigns, should stand possessed of the said *East India* annuities, bank annuities, *fer* office bonds, and the said bonds for 2,400*l.* and 600*l.* upon trust, to get in the money secured by the said two last-mentioned bonds, and invest the same in Government or real securities, and pay the interest and dividends thereof as therein mentioned. And the defendant *John Morgan* covenanted, that in case the said trustees should not, within two years, be able to recover payment of the whole of the money secured by the said bonds for 2,400*l.* and 600*l.* he (the defendant) his executors or administrators, would make good the same; and he also covenanted to pay to the said trustees

trustees a further sum of 2,500*l.* as therein mentioned. On the execution of the settlement the defendant prevailed on his said trustees to advance the plaintiff 8,000*l.* on the aforesaid mortgage, which they did in part in the following manner, viz. by assignment of the bond for 2,400*l.* given to *Chardin Morgan* (and which had been previously, as was stated, assigned by him to the defendant's trustees,)—by payment by them of 4,209*l.* 7*s.* 1*d.* arising from the sale of the said *East India* and Bank annuities, and 12*s.* 11*d.* added thereto by the defendant, all which were received by the defendant as agent, &c. for the plaintiff, and the defendant gave the plaintiff his accountable receipt for 6,610*l.*; and a memorandum of the whole of the transaction was endorsed on the settlement; and on the 2d *June* 1775, the term was assigned to the trustees under defendant's settlement, by way of mortgage for that sum. On the same day the plaintiff executed to the defendant a receivership deed, appointing him receiver of the rents and profits of the estates so mortgaged to the trustees (a new appointment having in the mean time been made of *Chardin Morgan*, as a trustee of the term, in the room of *James*), with power to bring ejectments: and out of such rents and profits, the defendant was to keep down the interest of the 6,610*l.* and pay the residue to the plaintiff. On the 2d *April* 1776, the defendant's trustees advanced the plaintiff, by payment to the defendant, as his agent, a further sum of 1,200*l.* for securing which, with 190*l.* advanced by the defendant himself, the term was further mortgaged by deed poll, indorsed

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indorsed for 1,390*l.* for which sum the defendant also gave the plaintiff his further accountable receipt, making a corresponding memorandum on the back of his marriage settlement, declaring thereby that 1,200*l.* part thereof was applicable to the trusts therein. On the 3d of the same month *Henry Wilder* (a trustee under the marriage settlement of *James Morgan*) advanced on further mortgage of the term 4,000*l.* by payment to the defendant, for which also he gave the plaintiff his accountable receipt; and in the following *May*, the defendant paid off the mortgage for 5,000*l.* to *Dr. Kent*, and interest, amounting to 309*l.* 7*s.* 6*d.* In the ensuing *July*, *Chardin Morgan* advanced the plaintiff 1,000*l.* on an assignment of his interest in a decree in a suit in Chancery, entitled *Lewes v. Popkin*, for which sum likewise the defendant gave the plaintiff his accountable receipt.

In *December* of the same year the defendant delivered to the plaintiff an account of the application of all the sums so received by him as his agent, making together the sum of 13,000*l.* And on the 24th of *February* 1777, after a meeting for the purpose, where the said accounts were investigated by the plaintiff, and certain trifling deductions made by him under the stated account in his own hand-writing, having also himself ticked off all the items for the disbursement of which by *Morgan* vouchers had been produced, the plaintiff wrote under the account the following memorandum, which he signed, "4th February 1777. "Settled and allowed the above account (errors excepted),

"excepted), the balance, after deducting 55*l.*, being 567*l.* paid by note of hand;" which note of hand was then given to the defendant, who thereupon delivered up to the plaintiff all his vouchers for the account, and a duplicate thereof, which was signed by him.

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Immediately afterwards the defendant (as he stated) lent the plaintiff 200*l.* for which he took his note of hand; and he also lent him 300*l.* more on the credit of the decree already alluded to, for which and other sums amounting to 1,142*l.* the defendant afterwards recovered judgment, and took a warrant of attorney, and also for 1,547*l.* 19*s.* recovered at the suit of *Chardin Morgan*, on the sums of 1,000*l.* 120*l.* and 300*l.* advanced in 1776 and 1777, and the interest.

In *August* following, the interest of the mortgage money of 8,000*l.* advanced by the defendant's trustees, being in arrear, the defendant filed a bill on the mortgage, and brought ejectments on the term to enable him, as receiver, to enter into the receipt of the rents and profits. In *September* it was referred to the arbitration of two solicitors, *William Parry* and *Henry Holt*, to ascertain what was due from the plaintiff to the defendant on the mortgages and judgments, with a view to the paying off of the whole, and releasing the estates: the proceedings in ejectment to be stayed in the mean time for six months: and the tenants to suffer judgment to be entered up against the casual ejectors, the last day of *Hilary* then next.

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In *March* 1779, the referees made their award, declaring (after reducing the defendant's bills of costs from 1,138*l.* to 569*l.*) that there was due to the defendant and his trustees 16,968*l.* 17*s.* 7*d.* on the mortgages and judgments; and the defendant having, in the next *Easter* Term, obtained judgment for the 569*l.* and executed a writ of *fieri facias*, on the old judgment for 1,142*l.* on timber felled by the plaintiff on the estates, not comprized in the mortgage term. In *Hilary* 1780, a reference of all matters in difference to Mr. *Blake* was made a rule of Court by consent, who awarded the timber to be sold, and the proceeds, deducting all reasonable costs and charges, to be paid to the defendant; and that *Rhys Davies*, of *Swansea*, should be appointed receiver of the rents and profits of the mortgaged estates, who was to apply the same in payment of the interest of the 8,000*l.* and 4,000*l.* due to the defendant's trustees, and the costs of the ejectments, and to pay the residue, after deducting the costs of the receivership, to the plaintiff.

1783.

Hilary Term.
Bill filed.

In *Hilary* 1783, the plaintiff filed the present bill against the defendant, stating that the sums, amounting to 12,000*l.* said to have been advanced, had not been advanced in fact, but merely some small sums on account; that the 5,000*l.* mortgage was not paid off till *May* 1776, and that the plaintiff never executed a bond for 2,400*l.* to *Chardin Morgan*, or, if he did, it was only to raise money on; that the defendant had never delivered any bills of his fees and disbursements, and that

that there were errors in the account settled 24th February 1777: and he prayed *that an account might be taken of all dealings and transactions between the plaintiff and defendant, and James Morgan and Henry Wilder and the plaintiff, and Chardin Morgan, deceased, and particularly between the plaintiff and the defendant John Morgan, and of what was really and bona fide due to the defendant and his trustees, and the mortgagee Wilder*; and that so much of the several sums of 6,610*l.* 1,390*l.* and 4,000*l.* as should appear to have come to the hands of *George Morgan*, might be answered by him accordingly, and as to what should appear to have come to the hands of *Chardin Morgan*, in his life-time, might be answered out of his assets by *James Morgan*; that the award of *Holt and Parry* might be declared void; that the defendant's bills might be taxed; and that on payment by the plaintiff to the defendant and his trustees, and the mortgagee *Wilder*, what should be found due on taking such several accounts, the plaintiff might be let in to redeem the estates comprised in the said term of five hundred years, and that the defendants might be restrained from selling any more of the timber felled; but that the remainder unsold might be sold for the plaintiff's benefit.

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 Prayer of the
 plaintiff's bill.

To that bill the defendant, the mortgagees, and judgment creditors, duly appeared, and on the 25th of *March* 1784, the defendants *William Farrer* and *James Morgan*, put in their answer, thereby stating, that the said bond for 2,400*l.*

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had been assigned to them as trustees of the marriage settlement of the defendant *John Morgan*, dated the 5th of *May* 1775, and which, being added to 4,209*l.* 7*s.* 1*d.* other trust money, made 6,609*l.* 7*s.* 1*d.* which, with 12*s.* 11*d.* paid by the said defendant, made in the whole 6,610*l.* the consideration for the mortgage of the 2d of *June* 1775; and that some time before the date and execution of the deed poll of the 2d of *April* 1776, they advanced the plaintiff 1,390*l.* by paying the same into the hands of the said defendant, as his attorney, and the same was secured to them by the deed poll; that they had no interest in the said sums, making together 8,000*l.*, save as trustees as aforesaid, the same being money settled on the marriage of the defendant with the said *Amelia*; and the said *James Morgan*, by the same answer said, that on the 2d of *February* 1776, he advanced the said plaintiff 4,000*l.* part of the trust money settled on his the said *James Morgan*'s marriage, by paying the same into the shop of the said Messrs. *Hoare*, in *Fleet Street*, in the name of the said defendant, as the attorney to the said plaintiff, yet that no security was executed till the 3d of *April* following; and he further said, he believed that the said *Chardin Morgan* in his life-time, advanced the said plaintiff 1,000*l.* 300*l.* and 120*l.* and found it necessary to bring an action at law, for re-payment or better securing the re-payment thereof; and that the said *Chardin Morgan* afterwards dying, the said plaintiff executed a warrant of attorney to enter up judgment against him for principal, interest, and costs, amounting to 1,547*l.* 19*s.*

On

On the 19th of *May* following, the defendant *John Morgan* put in his answer, thereby denying all the material allegations in the bill, and also denying that the consideration money for the several securities were not advanced, or that there were any errors, overcharges, or omissions in the account of the 24th of *February* 1777; and also denying all fraud whatever on the part of himself, or the trustees or mortgagees.

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1 Op. & W. 606.

Henry Wilder, by his answer, stated, that he was trustee of the marriage settlement of the said *James Morgan* for the said 4,000*l.* And *George Morgan*, by his answer, said, that he executed the aforesaid mortgages as trustee for and by the direction of the plaintiff, and believed that the said sum of 12,000*l.* was *bonâ fide* advanced to or for the use of the plaintiff.

On the 2d *June* 1788, the defendants (having in the mean time made several motions to dismiss the plaintiff's bill for want of prosecution) the cause came on to be heard on bill and answer only, the plaintiff not having examined any witnesses in support of his bill, when the only question which was made was, *whether the judgments were tackable to the mortgages?* and the Court declared, that the judgments were tackable; and that therefore the Court could make only the usual decree for redemption, on payment of principal and interest and costs, and recommended the counsel, on both sides, to draw up heads of a decree to be presented to the Court on the 5th of *June*;

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but counsel not agreeing, nothing further was done.

On the 10th of *April* 1794, a report was made in the cause of "*Lewes v. Popkin*," by Mr. *Eames*, then one of the Masters of the Court of Chancery, in pursuance of an order of reference to him respecting the aforesaid sums of 1,000*l.* and 300*l.*, whereby he certified the aforesaid indenture of the 11th of *July* 1776, and the indorsement thereon of the 8th of *March* 1777, and that he had computed interest on the said sums of 1,000*l.* and 300*l.*, to the 8th of *March* 1794, which amounted to 1,105*l.*, whereto being added 5*l.* 17*s.* 6*d.* for interest from the said 8th of *March* 1794, to the 10th of *April* then instant, they made together, to be due to the said *James Morgan*, on the said 10th of *April*, for principal and interest, 410*l.* 17*s.* 6*d.*, which report was, by order dated the 20th of *May* following, absolutely confirmed.

Order of 10th
July 1795.

By an order made by the said Court of Exchequer, in the cause of "*Lewes v. Morgan*," on the application of the plaintiff, dated the 10th of *July* 1795, it was ordered that Messrs. *Kent* and *Co.* should be at liberty to let and set the said estates, but they were to pay the rents and profits thereof to the defendant *John Morgan*.

In *April* and *May* 1796, the cause came on again to be heard, when the answer of the said defendants *William Farrer* and *James Morgan*, stating the actual payment of the 1,390*l.* into the
 hands

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money received by him by the rents and profits of the estates, as being the plaintiff's attorney, and in whom as such he placed his sole confidence. This is a case of attorney and client. An attorney has often been described to be an officer of the Court, and in that character responsible for the protection of his client, from all acts which may prove detrimental to his interest. It is his duty to apprise him of the legal consequences of his actions, and he ought to be able to lay before the Court, when called upon, a ready account of all their mutual transactions, and to be able to corroborate them by evidence; and the Court may refer them to the Deputy Remembrancer.'

'In the case of *Walmesly v. Booth (a)*, Lord *Hardwicke* said, that an attorney's receipt for the amount of his bill of costs was no bar to his client's taxation of them; that a bond or mortgage given by his client for the amount was cognizable in a court of equity, in consideration of his power and influence. And so Lord *Loughborough* held in the case of *Bowman v. Payne*, and that a Court to whom an attorney is accountable as well as to his client, would not suffer such security to stand for more than the amount when taxed.'

'The objections made by the counsel for the defendant to the opening the accounts of their transactions are, 1st. that there are no specific errors charged by the plaintiff's bill; 2dly. that the ac-

counts are settled; 3dly. that the vouchers are delivered up; 4thly. that the award of Messrs. *Holt and Parry* was set aside by the award of Mr. *Blake*; and, 5thly and lastly, the length of time elapsed since the accounts were settled. As to the awards, they only shew, that in the opinion of one attorney, the charges of another attorney were very great. With respect to the first and second objections, it must be admitted, that the plaintiff's bill is not a strong one in respect of charging errors; for there are none specifically stated; but, on the other hand, on comparing the answers with the schedules, there appears to be no sort of accuracy in the accounts. Some are without dates, and they are so confounded as to have materially varied the balance, and so much irregularity and obscurity prevails, as to baffle investigation. As to the third objection of the vouchers having been delivered up to the plaintiff, where the objection to the accounts themselves are so manifest and strong as here, it may be doubted if the vouchers would verify them; at the same time, the danger of calling on a party disarmed of his vouchers to account, cannot but be a serious proceeding. It is however to be presumed that an attorney keeps regular accounts, to which great weight must be given; and the other party must give an account of what has become of the vouchers, or produce them. The plaintiff's counsel admit that the vouchers were delivered up, and consent to be satisfied with the defendant's verification of them on oath. In *Vaughan v. Lloyd* that was not considered an insurmountable objection.

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tion. There they were so supplied, and so they may be here, by the defendant's oath.'

'The circumstance of the plaintiff's situation in life—his being a barrister, an alderman, and a magistrate of the city of *London*—his having been sheriff and mayor of *London*—can have no weight against the single clear fact of his having delivered himself up to the defendant, as his confidential adviser and attorney.'

'The last objection made by the defendant's counsel to the opening the accounts is the length of time since they were settled. This bill however was filed in 1783, and the plaintiff then complained of having been ruined in his property, and embroiled in every species of litigation; whereas in the commencement of his connection with the defendant it was very much otherwise with him. On that part of the case I shall refer to what was said by Lord *Hardwicke*, in the case of *The Drapers Company v. Davis (b)*, that the behaviour of the solicitor in taking a judgment for his bills of costs, on the face of which were many extraordinary items and improper charges, warranted the Court, notwithstanding the length of time (which was from 1725 to 1742, seventeen years), in referring them to the Master to be taxed, and ordering the securities to be delivered up.'

1 Dr & H 807. 'On the ground therefore of complicated deal-

(b) 2 Atk. 295.

ings,

ings, and the confidential relationship in which the defendant stood as to the plaintiff, the unsatisfactory accounts delivered of the bills of costs, and all the other circumstances, we are of opinion, that the several dealings and transactions between the plaintiff and defendant ought to be investigated and examined by the Deputy Remembrancer. There must therefore be an account of all such dealings and transactions, and of all monies received by the defendant as agent, both to the plaintiff and the mortgagees, and the application thereof, making all just allowances. The bills of costs to be taxed. The plaintiff to produce all vouchers, or where any one is not forthcoming, and is sworn to have been delivered to the plaintiff, it must be received as an established fact that such voucher did exist. An account must also be taken of the rents and profits of the mortgaged estates, and of the estates not in mortgage, and of the timber felled thereon.'

It was accordingly decreed,

That it be referred to the Deputy Remembrancer to take an account of all dealings and transactions between the said plaintiff and the defendant John Morgan, in the pleadings mentioned, and of all sums of money received by the said defendant, as agent to the said plaintiff, and also to the mortgagees, and when and how such sums of money were paid or applied to their accounts respectively, and to tax the several bills of costs claimed to be due to the said defendant from the said plaintiff,

1817.


LAWRENCE
v.
MORGAN
and others.

Original decree of this Court.

/ Dn & W. 606.

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v.
MORGAN
and others.

plaintiff, as his attorney, solicitor, or otherwise; and to report what he should find due from the said plaintiff to the said defendant on account thereof; and to take an account of the rents and profits of the mortgaged estates in the pleadings mentioned, and of the timber which had been felled thereon, and on the estates not in mortgage received by the said defendant, or by any other person or persons, by his order, or for his use, or which, without his wilful default, he might have received, and the times when he or they respectively received or might have received the same; and to take an account of the rents and profits of the said plaintiff's estates not in mortgage, and of which the said defendant then was or had been in possession under the several executions in the pleadings mentioned, or otherwise received by him, or by, &c. (as before.) And the Deputy Remembrancer was to make to all parties all just allowances, and all parties were to be examined on interrogatories touching the several accounts and bills of costs, as the Deputy Remembrancer should direct, and were to produce before the Deputy Remembrancer (upon oath, if required) all books, deeds, evidences, papers, writings, and vouchers, in their, or any or either of their custody or power, relative to the several matters thereby referred. And it was ordered, that if in the taking of the said accounts, and the taxing of the said bills of costs, it should appear that any one or more voucher or vouchers in support of any one or more article or articles in the said accounts, and bills of costs, had been lost, or could not be found, then

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 v.
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 and others,

then the said defendant should make oath before one of the Barons of that Court, that such voucher or vouchers did theretofore exist, and of the contents and purport thereof, and that the same had been delivered up to the said plaintiff.

And it was further ordered, that the directions and provisions in the order of the 10th day of July 1795, should continue and remain in full force, as if the same were herein contained, and made part of this decree. And it was ordered, that the consideration of interest of monies received by the said defendant, or which, without his wilful default, he might have received until the actual payment or application thereof, and the consideration of the costs, and all further directions touching the matters thereby referred, should be reserved until the Deputy Remembrancer should have made his general report touching the said matters; and in the mean time all or any of the parties were to be at liberty to apply to the Court, as there should be occasion.

That decree, having been drawn up, was delivered to the said plaintiff for perusal; but it was not passed till *November 1797.*

On the 11th of *July 1798*, the plaintiff gave notice of motion for the 13th, that the said *William Farrer* and *James Morgan*, the mortgagees for 8,000*l.*, might be directed to deliver up the possession of the mortgaged estates, on the ground, that *the 8,000*l.* had been paid off by rents and profits*, when the counsel for the mortgagees and
 judgment

1817.
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 LEWES  
 v.  
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 and others.

judgment creditors, submitted, that the motion could not be granted while the subsequent mortgage for 4,000*l.*, and also the judgments for 1,547*l.* 19*s.*, 1,142*l.*, and 569*l.*, which were decided to be *tackable to the mortgages*, remained unpaid. An order, agreeable to one part of that application, was made on the 13th (*July*) referring it to the Deputy Remembrancer to appoint a proper person to be receiver of the rents and profits, who was to pay the same half yearly to the defendant *John Morgan*, till further order.

In *November* 1799, the defendant put in his examination to interrogatories exhibited by the plaintiff, and in the schedules thereto, he set forth an account of all monies received by him as agent to the plaintiff, and to the mortgagees, and of the interest due thereon, and an account of the receipt of the rents and profits, and the application thereof.

1801.  
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 17th June.
 ~~~~~  
 Order on motion for separate report.

On the 17th of *June* 1801, the plaintiff moved that the Deputy Remembrancer might be at liberty to make a separate report of all dealings and transactions between the plaintiff and defendant, as far as related to the monies actually received and paid on account of the mortgages and judgments in the bill mentioned, and of all sums received by the said defendant, as agent to the said plaintiff, and also to the mortgagees, and when and how such sums were applied to their account respectively; and of the rents and profits of the mortgage estates in the pleadings in  
 that

that cause mentioned, and of the timber felled thereon, and on the estates not in mortgage, received by the said defendant, or by any person or persons by his order or for his use, and the times when he or they received or might have received the same; and also of the rents and profits of the said plaintiff's estates not in mortgage, and of which the said defendant then was or had been in possession, under the several executions in the said pleadings mentioned, or otherwise received by him, or by any person or persons by his order, or for his use; and the times when he or they received or might have received the same. And on the 20th an order was made in the words of the notice.

1817.  
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 MORGAN
 and others.

In *December* 1801, and in *January, February, March, April, and May*, 1802, the parties attended the Deputy Remembrancer on the reference to him under the last order. And on the 16th *July* the Deputy Remembrancer made his *separate report*, and thereby certified

That the plaintiff had applied to the said defendant to raise him money on mortgage, on his and wife's estates in *Wales*, and that, pending the negociation for such loan, *the said defendant had advanced the said plaintiff divers sums of money, the property of Chardin Morgan, in his hands*, and took the plaintiff's bonds to the said *Chardin Morgan* for the same, which bonds were afterwards consolidated by a bond for 2,400*l.*, the component

1802.
 ~~~~~  
 16th July.  
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 1st. Separate
 Report.

1817.

LEWES

v.

MORGAN
and others.

component parts whereof were set forth in the first schedule.

*That the money advanced on the said bond for 2,400*l.* was the proper money of the said defendant, and he certified the indenture of the 4th of May 1775; the indenture of settlement of the 5th of the same May; the indentures of lease and release of the 24th and 25th of March 1775; the deeds poll of the 31st of May and 1st of June 1775; and the indenture of assignment of the 2d of June.*

That the 6,610*l.* was made up of the said bond for 2,400*l.*, and of the aforesaid 4,209*l.* 7*s.* 1*d.* and 12*s.* 11*d.*, and that the said bond was deposited by the aforesaid *William Farrer* and *James Morgan* with the said defendant, and the said 4,209*l.* 7*s.* 1*d.* paid into his hands as agent to the said plaintiff; and therefore he had charged the said defendant with the whole of the said 6,610*l.*, composed as aforesaid, as monies actually received by him, as agent both to the said plaintiff and the mortgagees.

And he certified the aforesaid deed poll of the 2d of April 1776, for 1,390*l.*, and he found that the said 1,390*l.* was made up of 1,200*l.*, arising from the sale of trust funds, vested in the said *William Farrer* and *James Morgan*, and of 190*l.* added thereto by the said defendant out of his own proper monies, and that the said 1,200*l.* was received by the said defendant as agent to the said plaintiff

plaintiff and the mortgagees, and he certified the indenture of the 3d of *April* 1776, for 4,000*l.*, and that the said 4,000*l.* was received by the said defendant as agent to the said plaintiff and the said *Henry Wilder*, the mortgagee, making together 12,000*l.*

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 v.
 MORGAN
 and others.

And that the said defendant had paid to the said plaintiff, or to his use, the whole amount thereof in manner set forth in the second schedule, amounting to 12,000*l.*, which he had allowed, exclusive of the costs of the trustees of the term of five hundred years, in the execution of the trusts thereof; in which schedule was comprized the several sums of 2,400*l.* and 13*l.* 19*s.* 5*d.*, which he said defendant, on the aforesaid 2d of *June* 1775, had applied in discharge of the principal and interest then due, in respect of the said bond for 2,400*l.*, and which bond was on that day delivered up to the said plaintiff to be cancelled.

And he certified the indenture of the 11th of *May* 1776, for 1000*l.*, and that the said defendant, as agent to the said plaintiff, received the same 1,000*l.* of the said *Chardin Morgan* for the use of the said plaintiff. And he certified the aforesaid deed poll of the 8th of *March* 1777, for 300*l.*, and the aforesaid warrant of attorney of the 6th of *July* 1778, for 1,547*l.* 19*s.*, composed of the said 1,000*l.* and 300*l.*, and of 120*l.* and interest; and that the said defendant had paid and applied the said 1,000*l.* to or to the use of the said plaintiff in manner stated in the third

VOL. V. F schedule,

1817.

 LEWIS
 v.
 MORRIS
 and others.

schedule, amounting to the sum of 1,000*l.*; 65*2l.* 2*s.* 1*d.* whereof consisted of money paid to or to the use of the plaintiff, which he had allowed, and 347*l.* 17*s.* 11*d.*, *residue thereof, he found the defendant had retained in or towards the discharge of bills of costs claimed to be due to him.*

And he certified the warrant of attorney to enter up judgment for 1,142*l.*, and that the same was composed of the sums stated in the fourth schedule, amounting to 1,142*l.*; 530*l.* whereof he found to have been money paid by the said defendant to and on the account of the plaintiff, which he had allowed, and the residue thereof consisted of the particulars in the same schedule stated.

And he certified the aforesaid judgment for 569*l.* And he found, that over and above the sums thereinbefore mentioned to have been received by the said defendant, as agent to the said plaintiff, and on his account, he had received the several sums mentioned in the fifth schedule, amounting to 1,340*l.* 4*s.*; and that he had thereout paid to several persons on account of the said plaintiff several sums, to the amount of 790*l.* 0*s.* 9½*d.*, which he had allowed, and 550*l.* 3*s.* 2½*d.*, residue thereof, he found the said defendant had retained in or towards discharge of bills of costs, the particulars of which payments and applications were set forth in the sixth schedule, amounting to 1,340*l.* 4*s.* And he found that the defendant had received for rents and profits the several sums mentioned in the seventh

seventh schedule, amounting to 16,669*l.* 18*s.* 1½*d.*, and had disbursed for taxes and otherwise several sums amounting to 1,471*l.* 10*s.* 9½*d.*, which he had allowed, the particulars whereof were set forth in the eighth schedule.

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 Lewis
 v.
 Morgan
 and others.

And he found the defendant had received for rents and profits of the estates not in mortgage several sums mentioned in the ninth schedule, amounting to 1,818*l.* 2*s.* 6*d.*, and had disbursed thereout for taxes and otherwise several sums mentioned in the tenth schedule, amounting to 76*l.* 6*s.* 11*d.*, which he had allowed.

And he found that the defendant had received for timber several sums mentioned in the eleventh schedule, amounting to 739*l.* 15*s.* 7*d.*

And he certified that he had taxed the costs of the ejectments at 182*l.* 17*s.* 8*d.*, and the costs of the judgments at 55*l.*, but had not taxed the costs of proceedings on the said judgments—conceiving that he was not authorized so to do.

To that report the plaintiff took ten several exceptions, 1st. That there was no evidence that the several sums, the component parts of the said 2,400*l.*, were advanced by the said Chardin Morgan, or the defendant John Morgan, and, if advanced, they appeared to have been the money of the said defendant; and therefore ought not to have formed any part of the account directed by the order of the 20th of June 1801, which was

The plaintiff's
 exceptions to
 the first separate
 report.

1817.

 LEWES
 v.
 MORGAN
 and others.

confined to such monies only as were received and *paid on account of the mortgages and judgments*, or received by the defendant as agent to the plaintiff and the mortgagees.

2dly. That the money advanced on the said bond for 2,400*l.* was, if advanced at all, *the proper money of the defendant, and had no relation to the account directed by the order of the 20th of June 1801.*

3dly. That the only consideration of the mortgage for 6,610*l.*, or the only money received by the defendant as agent aforesaid, in respect to that transaction was, 4,209*l.* 7*s.* 1*d.*; the said *bond for 2,400*l.* having no relation to the said mortgage*, and being an item in the *general account*, and not within the meaning of the said order, and that the 12*s.* 11*d.* was never paid.

4thly. That there was *no evidence* respecting *the receipt of 1,200*l.**, part of the 1,390*l.*, by the said defendant, as agent aforesaid, or of the payment of 190*l.*, the remainder thereof, by the defendant, out of his own proper monies, or that any part of the said 1,390*l.* was advanced on account of the mortgage for that sum, *except a memorandum indorsed on the marriage settlement of the 5th of May 1775*; and if the said 1,390*l.* was paid by the said trustees to the defendant, it was not received by him as agent to the said plaintiff *in respect to that mortgage, and must therefore be considered like any other money belonging*
 to

to the said defendant, and afterwards advanced to the said plaintiff, and could only be referred to the general account, and therefore not within the terms of the said order; and the said 4,920l. 7s. 1d. and 4,000l., making together 8,209l. 7s. 1d., constituted the total amount of monies received by the defendant, as agent to the said plaintiff and the mortgagees.

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 v.
 MORGAN
 and others.

5thly. That the Deputy Remembrancer ought not to have allowed or included in the second schedule the said 2,400l., and the sum of 31l. 19s. 3d. for interest thereof.

6thly. That there was *no evidence* of the payment of 1,000l. (part of the aforesaid 1,547l. 19s.) by the said *Chardin Morgan* to the said defendant, as agent of the said plaintiff, *except the production of the assignment and judgment.*

7thly. That the Deputy Remembrancer ought not to have certified the warrant of attorney of the 6th of *July* 1778, for 1,142l., or the composition thereof, as the same had no relation *to the accounts directed by the order of the 20th June* 1801.

8thly. That the Deputy Remembrancer ought not to have set forth the judgment for 569l. *for the same reason.*

9thly. That *for the same reason* the Deputy Remembrancer ought not to have certified the

1817.

LEWES

v.

MORGAN
and others.

receipt by the said defendant of monies amounting to 1,340*l.* 4*s.*, nor the application thereof.

Lastly. That the Deputy Remembrancer ought to have certified that the sum of 1,818*l.* 2*s.* 6*d.*, received by the said defendant for rents and profits of the estates not in mortgage were received by him as agent to the said trustees (the mortgagees).

In *November* and *December* following, the exceptions were argued; after which and before the Court had pronounced judgment there, the plaintiff, on the 15th of *July* 1803, obtained an order by consent, whereby he was to be at liberty to pay, on or before the 7th of *November* then next, to the defendant, and to the mortgagees, 16,000*l.*, being the amount of the principal and interest claimed to be due upon the aforesaid several mortgages for 6,610*l.*, 1,390*l.*, and 4,000*l.*, and the aforesaid two several judgment debts of 1,142*l.* and 569*l.* over and besides the monies after mentioned. And it was ordered, that on such payment the mortgagees should re-convey or assign the mortgaged estates to the plaintiff; and it was ordered that *John Phillips*, the then receiver of the rents and profits, should be discharged, and *John Brown*, of *Caermarthen*, gentleman, appointed in his stead; and that the said *John Phillips* should pay to the defendant, pursuant to an order of the 11th of *July* then instant, 1,618*l.* 4*s.* 7*d.*, balance of account to *Michaelmas* then last.

On

On the 9th of February 1804, the Court over-ruled all the ten exceptions, the *Lord Chief Baron* (M'DONALD) pronouncing the judgment of the Court as follows :—

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Lewts
v.
MORGAN
and others.

'The delay of twenty years and upwards has entangled this matter to such a degree, that there can be no surprise that men not intuitively gifted with the power of unravelling folly, stupidity, extravagance, absurdity, carelessness, and every thing that can tend to entangle an human transaction, can understand this cause. I have not myself such faculties as to be able, without infinite pains, trouble, and difficulty, even to comprehend it. We are not here in the case of an infant, but in the case of an adult—a barrister—a magistrate—one who has been sheriff of *Middlesex*, and one of the sheriffs of the city of *London*, and chief magistrate of that city, one who has settled accounts over and over again, and has executed deeds, solemn instruments, of which he was a perfectly competent judge, and has in subsequent instruments ratified those prior instruments so brought under his view and to his understanding repeatedly.'

1804.

9th July.

Judgment of
the Court of
Exchequer on
the exceptions

'I presume I need not say, that however large, extensive, and almost infinite, the powers of a court of equity are; in the case of attornies, in bringing them to account, they are yet to be bound by a reverential awe of disturbing solemn instruments repeatedly recognized, and of which the parties themselves were peculiarly competent judges. I need not say, that such instruments are not to be

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LEYVES
v.
MORGAN
and others.

disturbed at the distance of so many years; I need not call to mind the reverential awe, for I will repeat the words, that is due to marriage-settlements, under which children are purchasers, if there be any; but whether there be or not, that makes no difference, for the effect of the parties is equally solemn, and the intent of the instruments is the same; I need not say that mortgages of a great many years standing, since the time the contract with respect thereto was entered into, are not to be trifled with. Absolute demonstration would be necessary to overturn such instruments; but as between Sir *Watkin Lewes* and Mr. *Morgan*, these mortgages must never be touched, they have been solemnly entered into and acted upon, and have never been complained of for between twenty and thirty years from the time of their execution.'

'We have here a case in which the transactions began as far back as the year 1774, thirty years from the moment in which I am speaking. It seemed to me in the argument for the plaintiff, that it was supposed that he had never spent a shilling; that all the expenditures that were imputed to him were all false, from the beginning to the end: but, on the contrary, it was admitted by his counsel, that enormous sums were spent in election projects. We all know that a man does not serve the office of sheriff of *London* gratis—the office of mayor gratis—much less can a man make a considerable figure in the world gratis; it is impossible. And now the drift of these exceptions to the Deputy Remembrancer's report, is to enter into

into every part of the items at the distance of twenty-four or twenty-five years, and to enquire respecting large sums advanced upon mortgages, the mortgagees being in many instances trustees under marriage-settlements.'

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 LEWES
 v.
 MORGAN
 and others.

It is said in the present instance, that the mortgage money is compounded of various sums, and of bonds, of which bonds the Deputy Remembrancer states one bond to amount to 2,400*l.*, and that the Deputy Remembrancer ought to have entered into all those sums. This bond for 2,400*l.* composes part of the sum that was settled by the defendant *John Morgan*, on his marriage, upon his wife and children; it was delivered by him to the trustees of such marriage-settlement, and they delivered it again to him as the agent of the plaintiff, to be cancelled. And in a subsequent mortgage to Mr. *Wilder*, this very transaction reciting this very bond, is again recognized, and that instrument is executed by the plaintiff at the distance of some time; and now it is asked to enter into all the component parts of that bond as against the mortgagees. I believe so violent a thing was never done. But let us see whether there is any authority for doing it. The order of the Court for making this separate report directs, &c. [*read the Order on the Judgment of 1796, ante, p. 59.*]

'In the execution of this order, the Deputy Remembrancer seems to me to have done precisely what he ought. The three first of these exceptions all relate to the same subject; and the sum
 and

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 v.
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 and others.

and substance of the transaction is neither more nor less than this, that certain sums of money being necessary for the plaintiff's occasions, 12,000*l.* was to be raised, and of this 12,000*l.*, 2,400*l.* is the part most objected to. I have already given the history of that; and it should seem to me, that the idea of its now being to be taken from the account of the mortgages, and made an item in the general account between the defendant *John Morgan* and the plaintiff, would be the greatest injustice to the mortgagees and the *cestuis que trust* of those mortgagees. The effect of the order for a separate report does not reach any such transaction; it has been in that order studiously avoided. It unquestionably never was the intention of the Court to disturb the mortgages; as well might it be supposed it was intended that the judgments should be disturbed; that certainly was not the case: and the Deputy Remembrancer well understood the order, by proceeding upon the foot of those solid instruments executed at the distance of so many years.'

'Without travelling minutely through every one of these exceptions, with respect to the other sums, the same observation applies; that they are all comprehended in solid instruments which have been executed long ago, and which the party himself, a professional man, has had the revision of again and again, and never made the least objection to till within these few years, although the transaction upon which they are bottomed is as old as 1774.'

'The

‘The only further observation I will make, is upon the objection to certain retainers by the defendant *John Morgan* for his bills of costs; and these amount to large sums: one item, 300*l.* and upwards; another, 500*l.* and upwards. We are going over a great length of time—for a great number of years. We know that election contests are expensive matters. When these matters are brought into a sheet of paper, the sum seems large; but when the situation and condition of the parties, and length of time, be considered, the sums appearing to have been expended in litigation and the various transactions for thirty years back, though they may startle the eye at first perhaps, yet, when considered, there may be a more reasonable foundation for them than appears at first sight. With respect to this, I have understood all along that these bills of costs are to be taxed.’

‘The Master has properly stated what the defendant *John Morgan* has accounted for, namely, his receipts in his quality of agent for the plaintiff, or in his quality of agent for the plaintiff and the mortgagees; he therefore states that these sums are received. There are certain bills of costs which were paid to other attornies; but these I take not to be costs as between the defendant and the plaintiff, they are not bills to be taxed as against the defendant, and therefore these are proper charges; but what he has retained in the application of the plaintiff’s money which came to his hands for his own bills of costs, that is still
the

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 LARSEN
 &
 MORGAN
 and others.

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LEWES
v.
MORGAN
and others.

the subject of taxation: and therefore the only question is, whether those sums are to be struck out of his report or not? In either case they would be the subject of taxation.'

'Then let us consider whether they ought to be struck out in this case. It is true, an attorney has no claim for his costs till they are taxed, if a party wishes they should be taxed; but in transactions begun thirty years ago, is it to be supposed that a man is to lie out of his money, because his client never calls upon him to have his bills taxed? It would be impossible for any man of business to go on in that way; and therefore it seems to me just, that the defendant *John Morgan* should for the present retain the money for those bills of costs, and the other items in the account not objected to for so long a time. But at the same time the plaintiff will have the benefit of the taxation of these bills, and whatever the Master deducts from them, will be placed to his credit. In so complicated a business, it would be needless to go into a detail: We are all clearly of opinion, considering all the circumstances of the case, that this is such a report as is proper, and that the exceptions must be over-ruled.'

Against so much of that order as related to the 1st. 2d. 3d. 4th. 5th. 6th. and 10th. exceptions, the plaintiff appealed to the House of Lords, stating, that the defendant had prevailed on him *to execute the several mortgage securities without his knowing*

*knowing the contents thereof—that the considerations thereof were not paid—that no bond for 2,400*l.* ever existed; and if it did, that no consideration was ever paid; and that at the time of the execution of the said bond, and of the several other bonds before mentioned, the defendant had in his hands considerable sums of money belonging to the plaintiff.*

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MORGAN
and others.

In *January* 1807 the appeal was heard, when the appellant's (plaintiff's) counsel admitted, that the decree did not direct any account of the mortgages, or any inquiry into the component parts of the bonds, consolidated by the bond of the 28th of *February* 1775; but they contended that the Court did not mean to consider the said bonds as conclusive evidence of the advancement of the consideration thereof. In answer to which the respondent's (defendant's) counsel insisted, that the plaintiff did not, at the hearing of the cause in 1796, impeach or attempt to impeach the mortgages; but, on the contrary, admitted them to be valid; insisting that the defendant should be charged with the whole 12,000*l.*, as actually received by him, as also with the 1,000*l.*; and the counsel for the defendant, and for the mortgagees, further contended, that the bonds were vouchers and evidence, unless fraud or imposition were proved; whereas no such thing either was, or was even attempted to be proved; and that the Court of Exchequer, by unanimously confirming the report, had in effect declared such to be the true intent and meaning of the original decree.

1807.

January.

1st. Appeal
heard.

On

1817.

LEWES
v.
MORGAN
and others.
1807.

20th June.

Judgment of
the House of
Lords, over-
ruling the de-
cree of this
Court.

On the 20th of *February* following, the House of Lords delivered judgment as follows:—

LORD REDESDALE. [Having stated the facts of the case—the decree of the Court of Exchequer of the 2d of *July* 1796 (on the motion by the plaintiff of the 20th *June* 1801, for a separate report as to the mortgage account, made with a view to found an application thereon, to be let into possession of the mortgaged estates)—and the report of the Deputy Remembrancer (16th *July* 1802)—proceeded as follows:—]—‘To that report several exceptions have been taken, which have already been the subject of much discussion. The main drift of those exceptions is, that the Master has proceeded to charge Sir *Watkin Lewes* on the foundation of certain securities, which ought to be regarded as suspicious, and therefore ought not to be considered as conclusive evidence, to which no objection could be made.’

‘The 7th, 8th, and 9th exceptions, which were taken by Sir *Watkin Lewes*, are not under the consideration of your Lordships. The 10th exception stands on totally distinct grounds, and applies to the manner in which certain sums of money were received by Mr. *John Morgan*. The first exception applies to the sum of 2,400*l.* and the manner in which that comes under your Lordships’ consideration is this; the first mortgage amounted to 6,610*l.* one of the items which compose that sum is clearly *Chardin Morgan’s* bond amounting to 2,400*l.* It is insisted on the part

part of Sir *Watkin Lewes*, that no such sum of money as that stated on the part of the respondents before you was ever advanced.' Then (stating the 1st exception) his Lordship continued—'I should observe, that the order of the Court of Exchequer for a separate report so obtained by Sir *Watkin Lewes*, raises a considerable degree of difficulty in considering the question, whether the exceptions taken to the Master's report, be founded or not; those exceptions having been over-ruled by the Court of Exchequer, we must therefore endeavour to get out of the difficulty as well as we can.'

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MORGAN
and others.

'Now one part of those exceptions is, that the sum of 2,400*l.* for which a bond was given by Sir *Watkin Lewes*, was not the money of *Chardin Morgan*, but was the money of Mr. *John Morgan*; and on looking into all the evidence that exists on that subject, it is perfectly clear, that until Mr. *John Morgan* gave in his answer to the bill of Sir *Watkin Lewes*, it was not pretended, that it was the money of Mr. *Chardin Morgan*; and the marriage settlement of Mr. *John Morgan* shews that it was not the money of Mr. *Chardin Morgan*, but the money of Mr. *John Morgan* himself. It is most clear, that the transaction was of such a nature that it is extraordinary that Mr. *John Morgan* should ever have pretended that it was the money of *Chardin Morgan*, because, if it had been money advanced by Mr. *John Morgan* out of the money belonging to Mr. *Chardin Morgan*, that is, if it had been
actually

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MORGAN
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actually the money of *Chardin Morgan* and not of *John Morgan*, there must exist accounts between those two persons, which would have shewn the nature of the transaction; and such accounts must be within the power of Mr. *John Morgan*. No such accounts however are produced.'

'But when we come to look at the different sums which form the component parts of the 2,400*l.* it is perfectly clear, that part of that sum was not the money of Mr. *Chardin Morgan*, and it is perfectly clear, that the representation contained in the answer of Mr. *John Morgan*, cannot be true; because, first, with regard to the sum of 500*l.* he says expressly in his answer, that that sum of 500*l.* was advanced by Mr. *Chardin Morgan*, and received by Sir *Watkin Lewes*. And he produced before the Deputy Remembrancer, a small slip of paper, as evidence to shew, that he advanced that sum of 500*l.* "1774, January 31st.—Advanced "Sir *Watkin Lewes*, on bond, 500*l.*—"N. B. 1,000*l.* "was borrowed of *Walter* by *Holt*, and 20 guineas paid, and thereout 500*l.* advanced Sir *Watkin Lewes* in bank notes; and he paid out of it "10 guineas."—Your Lordships see therefore, that this sum of 500*l.*, which is admitted to be the 500*l.*, which is alledged to have been advanced by *Chardin Morgan*, was the sum of 500*l.* part of the sum of 1,000*l.*, which was borrowed of *Walter*, and out of which 10 guineas were paid by Sir *Watkin Lewes*. It is manifest therefore, that the representation contained in the answer of Mr. *John Morgan*, on the subject of that bond, is not true, and that the said

500*l.*

500*l.* was not procured in the manner in which it is there stated; and this sum of 500*l.* which is stated to have been advanced Sir *Watkin Lewes* on bond (if it was advanced at all) must have been advanced by Mr. *John Morgan* himself. And if your Lordships look at the appendix, which contains the accounts as taken on the part of Mr. *John Morgan*, it is perfectly clear, that though he states in his answer that Sir *Watkin Lewes* was debtor to Mr. *Chardin Morgan*, yet in his books he states him to be debtor to himself. The account runs thus—

" *January* 31st, 1774, advanced Sir *Watkin Lewes*,
 " on bond, 500*l.*, and he paid 10 guineas out of it.
 " *February* 10th.—Do. by accepting draft for
 " 50*l.* payable at thirty days, and by paying *Thomas Morgan*, Esq. 50*l.*

		£100 0
" <i>February</i> 19th.	To Mr. <i>Skinner</i>	80 0
" <i>May</i> 13th.	Do. on Bond	220 0
" 24th.	Do. Note of Hand	10 10
" 27th.	Do. on Bond	120 0

All these are evidently entries in Mr. *John Morgan's* own books of his own transactions, without one word being said that this was the money of Mr. *Chardin Morgan*, and which should have corresponded with the fact. I take it to be clear, if this sum had been ever advanced, it was advanced by Mr. *John Morgan*; and Mr. *Chardin Morgan's* name was made use of in trust for Mr. *John Morgan*. And it is utterly inconceivable, if this in fact had been Mr. *Chardin Morgan's* money, that *John Morgan* should have executed an instrument, in which it was stated that this

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was originally and from the beginning the money of Mr. *John Morgan*, and not the money of Mr. *Chardin Morgan*. And that is stated by the Master in his report as a fact, the consequences of which are serious with respect to this case; for, if in truth this money was advanced by Mr. *Chardin Morgan*, and the bond given for that sum, was really his bond for his own benefit, the consequence would be, that Mr. *John Morgan* had no interest in it, till he became a purchaser of it by assignment; but if this was a transaction in which Mr. *Chardin Morgan's* name was only used as a trustee for Mr. *John Morgan*, the result would be, that this being a debt of Sir *Watkin Lewes* to Mr. *John Morgan*, the latter had in his hands during all this time money belonging to Sir *Watkin Lewes*, and nothing would be more unjust than to charge Sir *Watkin Lewes* interest, as for money advanced by other persons, while, at the same time, Mr. *John Morgan* had in his hands money belonging to Sir *Watkin Lewes*, for which there was no interest paid. That fact can be ascertained as I apprehend, and it ought to be ascertained. And that colour should not have been put on it, which has been given to it by Mr. *John Morgan's* answer, and which *has been contradicted, I apprehend, by other evidence* in the cause. If these things be so, with regard to the first exception, I submit that your Lordships should allow it so far for the purpose of having it stated, whether the sum of 2,400*l.* was advanced by Mr. *Chardin Morgan* to Sir *Watkin Lewes*; and whether that sum was due to

Mr.

Mr. *John Morgan* originally, and not to Mr. *Chardin Morgan*. *In taking this account, the Master will consider how far the acceptances and bonds executed from time to time by Sir *Watkin Lewes* to Mr. *Chardin Morgan*, are conclusive evidence of the fact, that the several sums of money alledged to have been comprised in the several bonds, constituting 2,400*l.*, and for which the bond to that amount was given, were actually advanced. Now, I apprehend, that in the dealings and transactions of parties of this description, and when an account of those dealings and transactions has been ordered to be taken by the Court, a person standing in the situation of solicitor, agent, general manager, and director, and having the whole concerns of the other party, and having made such other party execute instruments of this sort, which are therefore liable to suspicion, it becomes necessary not merely to rely on the instruments themselves, but to shew that the advances were actually made; and the nature of this decree shews, that such was the original intention of the Court. It directs the Deputy Remembrancer to take a general account of the dealings and transactions between these parties." The first exception applies to the Master's report, founded on what, he conceives, constitutes the component parts of the sum of 2,400*l.*, and the component parts of certain bonds said to have been executed by Sir *Watkin Lewes*, of the payment of the consideration of which bonds there is no evidence whatever, and there are circumstances in this case,

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*1 *Deu & H. 607.*

*1 Upon the Dec. 6. 26.
 1/4 ann. to 143
 last*

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which tend strongly to raise suspicions with respect to the ultimate payment of this bond.'

'I do not think necessary to go further into that enquiry. The Deputy Remembrancer has clearly done wrong in taking the instrument as conclusive evidence on the subject.'

'Now, what I would propose to your Lordships on this point is, that, as to the first exception which respects the bond for 2,400*l.* said to have been advanced to Sir *Watkin Lewes* by Mr. *Chardin Morgan*, the evidence appearing to me sufficiently decisive that this never was the money of Mr. *Chardin Morgan*, the Master should review his report, and particularly enquire and certify, what sums of money were advanced by Mr. *John Morgan*, on his (*Chardin Morgan's*) account, to Sir *Watkin Lewes*. Your Lordships' order will draw the attention of the Deputy Remembrancer, to that which seems the proper way for him to proceed in investigating these transactions.'

'The second exception is an exception to that part of the Master's report, which states, that the bond for 2,400*l.* was afterwards for a full and valuable consideration, bought up from Mr. *Chardin Morgan*, by his brother Mr. *John Morgan*. That is the substance of this second exception. If your Lordships should concur in opinion with me, with respect to the first exception, then this second exception ought also to be wholly allowed.

The

The Master has reported, that for a valuable consideration, this bond was bought up by Mr. *John Morgan* of Mr. *Chardin Morgan*: whereas that bond never was his property; and it therefore never could have been so bought up; and there is no trace of any such transaction, except in the assertion of Mr. *John Morgan*, and therefore I conceive the second exception ought to be allowed.'

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'The third exception is, that the Deputy Remembrancer has by his separate report further certified, that the sum of 6,610*l.* the consideration for the mortgage in the said report mentioned, consisted or was made up of the bond for 2,400*l.*, and the sum of 4,209*l.* 7*s.* 1*d.* arising from the sale of certain trust funds, vested in *William Farrer* and *James Morgan*, as trustees, named in the marriage settlement of the said *John Morgan* and *Amelia*, his wife; and of the sum of 12*s.* 11*d.* added thereto, by the said *John Morgan*: and that the said bond for 2,400*l.* was by the said *William Farrer* and *James Morgan*, deposited with the said *John Morgan*; and that the sum of 4,209*l.* 7*s.* 1*d.* was by them paid into the said *John Morgan's* hands: and that the bond so deposited, with 4,209*l.* 7*s.* 1*d.* paid into the hands of the said *John Morgan*, were so respectively deposited with, and paid to him as the agent, both of the said Sir *Watkin Lewes* and the said *William Farrer* and *James Morgan*, the mortgagees; and therefore he had charged the said *John Morgan* with the whole of the sum of

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6,610*l.* composed in manner aforesaid, as money actually received by him as agent, both to the said Sir *Watkin Lewes*, and the said mortgagees ; whereas he ought to have certified by his report, that the only consideration for the said mortgage for 6,610*l.* proved before him, was the said sum of 4,209*l.* 7*s.* 1*d.* or that the said sum of 4,209*l.* 7*s.* 1*d.* was, and constituted the only monies actually received and paid on account of the said mortgage, for the said sum of 6,610*l.*'

' My Lords, with respect to the sum of 2,400*l.* the observations which have been already made, I think will shew that this exception is well founded as to so much of the 6,610*l.*'

1 Q. & H. 616. ' With respect to the 12*s.* 11*d.* that is certainly a very trifling sum, but it seems to be material to take notice of it, for the purpose of the *principle* on which you should proceed. That sum is a sum thrown in to make the round sum, as it is alleged, of 6,610*l.*, which Mr. *John Morgan* chuses to charge himself with. Now, the object of the order for the separate report, is *to state the facts of this mortgage transaction, to ascertain what was the real transaction between the parties.* It is therefore impossible to allow Mr. *John Morgan* to bring in this small sum of 12*s.* 11*d.* because he might, on the same principle, bring in a sum to any amount, if he had chosen to say he had advanced any further sum ; instead of saying the trustees had advanced 4,000*l.*, he might have said, they only advanced 2,000*l.*, and that the other 2,000*l.* he had advanced

advanced himself: and therefore, it does seem to me that you should notice that sum, and should allow the exception so far as it concerns that sum. It does appear, that that sum was not the money of the trustees, and was not advanced by them, and consequently ought not to make part of the sum, for which the mortgage for 6,610*l.* was given, the mortgage purporting that this whole sum was the money of the trustees.'

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'With respect further to the aforesaid sum of 2,400*l.* the Master ought also, under this exception, to be directed to review his report, according to the directions before given on the first exception.'

'But it has been stated by the Master in his report, that the bond for 2,400*l.* was delivered to Mr. *John Morgan*, as agent to Sir *Watkin Lewes*, and also to *William Farrer* and *James Morgan*, the mortgagees. It seems therefore to be important, that the component parts of this bond should be ascertained, and that the Master, in reviewing the matter of this exception, should particularly enquire and certify how and in what manner this sum of 2,400*l.* was constituted, and whether the bond was ever cancelled and delivered up to Sir *Watkin Lewes*.'

'With respect to the fourth exception, the same sort of reasoning, that applies to the sum of 12*s.* 11*d.* on the former exception, will apply to the sum of 190*l.* mentioned in this fourth exception.'

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‘ The exception is, for that the Deputy Remembrancer had, by his separate report, further certified, that the sum of 1,390*l.* mortgage money therein mentioned, consisted or was made up of the sum of 1,200*l.* arising from the sale of other trust funds, vested in the said *William Farrer* and *James Morgan*, as trustees as aforesaid; and of the sum of 190*l.* added thereto, by the said *John Morgan*, out of his own proper monies.’

‘ Now, my Lords, that sum of 190*l.* said to have been advanced by Mr. *John Morgan*, should fall under the same consideration as the small sum of 12*s.* 11*d.* before mentioned. There is no evidence but the assertion of Mr. *John Morgan* himself that he made himself debtor for that sum, *that any such sum was actually advanced by the trustees*: and if not, it ought to have made no part of the mortgage. This puts the mortgagees in a different situation from Mr. *John Morgan*; I therefore conceive, that the exception as to the sum of 190*l.* ought to be allowed.’

‘ Then, my Lords, with respect to the sum of 1,200*l.* it seems to be extremely questionable, whether such a sum was ever advanced; at least there is no evidence of it; for, as to the sum of 600*l.* part thereof, which is stated to have been money secured by a bond, given by a person of the name of *John Adams* to *Chardin Morgan*, and which bond is stated to have been cancelled, and in the hands of Mr. *John Morgan*, if that bond had been a productive bond, it ought

to

to have been found cancelled in the hands of Mr. *Adams*. But it is produced as cancelled, and in the hands of Mr. *John Morgan*. And this is to be made evidence of 600*l.* being actually received by the trustees, and advanced to Sir *Watkin Lewes*. Now this 1,200*l.* is said to consist or be made up of six fen office bonds, for 100*l.* each, and the bond from *John Adams* to the said *Chardin Morgan* for 600*l.* and which latter bond is handed over to Mr. *John Morgan*, as agent for Sir *Watkin Lewes*. This transaction appears certainly not in the way one would expect. There is only assertion instead of the proof of facts, and certainly it is a suspicious circumstance, that Mr. *Adams's* bond is not in the custody in which it ought to have been. It was thrown out, that Mr. *Adams* was a person not very capable of having paid this bond. But still the fact of paying it does not at all appear, neither does it appear that such bond was purchased by Mr. *John Morgan*. There is not the slightest evidence whatsoever of that, and therefore I should submit to your Lordships, that the Deputy Remembrancer be directed also to review his report with respect to that bond, and particularly to enquire and certify, whether the trustees in the marriage settlement of Mr. *John Morgan*, ever, and when, and in what manner, received this money, to the amount of 600*l.* for which this bond was given to Mr. *Chardin Morgan*, and to enquire into all the circumstances of this bond of Mr. *Adams*; for it is a very extraordinary transaction as stated on the part of Mr. *John Morgan*. The Deputy Remembrancer will therefore

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therefore enquire, whether Mr. *Chardin Morgan* advanced the said 600*l.* to Mr. *Adams*, and when, and in what manner. My Lords, these are the directions I would give to the Master on the whole of this transaction, which seems to me, in all probability, to be a mere fabrication; this mortgage to Mr. *John Morgan*, through the medium of the trustees in his marriage settlement, seems very extraordinary. No sum of money has been actually advanced by him for the use of Sir *Watkin Lewes*; but there is a charge on Sir *Watkin Lewes* for interest for giving credit for sums said to have been paid.'

'The fifth exception applies to the application of the sum of 12,000*l.*, said to be advanced on the mortgages that have been mentioned. That exception is, for that the Deputy Remembrancer has, by his separate report, further certified, that he found, in respect to the application of the said sum of 12,000*l.* that Mr. *John Morgan*, as agent to Sir *Watkin Lewes*, paid to him and to his use the whole amount thereof, in manner particularly mentioned and set forth in the second schedule to his report annexed: and in such allowance are comprised the sum of 2,400*l.* and 31*l.* 19*s.* 5*d.*, which the said *John Morgan*, on the aforesaid 2d day of *June* 1775, applied in discharge of the principal and interest then due, in respect of the aforesaid bond of 2,400*l.* dated the 28th of *February* 1775, and which bond was on that occasion delivered up to Sir *Watkin Lewes* to be cancelled; whereas the Deputy Remembrancer ought not, for the reasons
stated

stated in the aforesaid exception, to have allowed or included in the second schedule to his report, the said sums of 2,400*l.* and 31*l.* 19*s.* 5*d.*, for principal and interest on the said bond, in respect of the application of the monies which the said *John Morgan* had received, as agent to the said Sir *Watkin Lewes* and the said mortgages; nor ought he to have allowed or included in the said second schedule to his separate report, the sums following, the sum of 21*l.* 5*s.*, 86*l.* 15*s.*, 289*l.* 10*s.*, 96*l.* 10*s.* 6*d.*, and 42*l.* 6*s.* 11*d.*'

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'Now, my Lords, on looking into this state of the application of the 12,000*l.* the first thing that I have to observe is, that there is in that application a material difference from another statement, as to the application of 2,400*l.* That of itself would tend considerably to invalidate this statement of the application of 12,000*l.* And you will find with respect to several sums of money, that they ought to have been carried to a totally different account, that is, to the general account between Sir *Watkin Lewes* and Mr. *John Morgan*, different and distinct from the mortgage money, and therefore it is not possible that the money charged for interest on those sums can be considered as an application of this mortgage money. If the Master had adverted to that, I think it is impossible he could have reported as he has done; but I say, that as to this bond of 2,400*l.* supposing it to be a just debt, it is a debt due to Mr. *John Morgan* himself. If you will take the trouble to cast up the sums of money which he charges Sir *Watkin Lewes* with,
 and

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and which follow the 6,610*l.*, beginning on a certain day in *June 1775*, you will find that he discharges himself by subsequent payments, including this sum of 2,400*l.* which he states to have paid on the 18th of *July*, and you will also find, that the stated account quite contradicts what the Master has stated by his separate report; for that sum of 2,400*l.* which was really and truly the money advanced by Mr. *John Morgan* to Sir *Watkin Lewes*, is made first of all part of the consideration of the mortgage, which is to bear interest; and then, of that mortgage money, a considerable part, viz. 2,400*l.* is not paid till after interest had been paid to Mr. *John Morgan* himself, and part of the application of the money is taken out of the money advanced.'

'It does strike me therefore, that it is necessary, for the purpose of obtaining justice between these parties, that the report ought to be very strictly reviewed by the Master.'

'Now what I should propose on this subject, is to refer it to the Master to review his report, and to certify how far the application of the mortgage money set forth in the second schedule, referred to by the report, is correctly and truly set forth. The result of all this will be, to shew that the application that is set forth in the Master's report, ought not to be considered as the true application of that money, and the Master must vary his report in that respect. To review his report will be sufficient for that purpose.'

'It

‘It seems extremely problematical, whether any of these transactions took place precisely as stated in the Master’s report. With respect to the sixth exception, the evidence on that subject appears to me to be extremely deficient: it consists entirely of the assertions of *Mr. John Morgan*, that such advances were made by *Mr. Chardin Morgan*. And what I should also propose to your Lordships, would be, for the Master to review his report, with respect to that exception, in regard to the 1,000*l.*, 120*l.*, and 300*l.*, and to ascertain in what manner those sums were received of *Chardin Morgan*, by his brother *John Morgan*, for the use of *Sir Watkin Lewes*.’

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‘The tenth exception depends on a totally different question. It refers to this: *Mr. John Morgan* had brought actions of ejectment for the purpose of obtaining possession of the estates of *Sir Watkin Lewes*, on the several demises of the trustees in his marriage settlement; who were the mortgagees of the said estates; and he included in those actions of ejectment, estates not comprised in the mortgages as well as those that were, and of which he had no right to obtain the possession; and by the means stated in the bill of *Sir Watkin Lewes*, he got judgment and possession. The rents and profits received, were partly for estates in mortgage, and partly for estates not in mortgage. In taking the account, the Deputy Remembrancer has charged the rents and profits of the estates in mortgage, against *Mr. John Morgan*, as agent of *William Farrer* and *James Morgan*,
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the mortgagees. But with respect to the estates out of mortgage, he has charged them against Mr. *John Morgan* himself; the effect of which would unavoidably be to carry them to the general account, and not to the account of the mortgagees. Now, I should observe to your Lordships, that although tortious possession was taken of these estates by Mr. *John Morgan*, yet considering the previous transactions that had taken place, he must be responsible in his character of agent, and therefore those rents and profits ought to have been put to his account as agent of the mortgagees, and not against the separate account of Mr. *John Morgan*.'

'My Lords, these are the observations which occur to me, upon the exceptions which have been taken to the Master's report; and if your Lordships concur in the opinion which I have formed of this case, it will be for the Court of Exchequer to give such further directions as may be necessary for giving effect to it.'

ERSKINE, *Lord Chancellor*.—'My Lords, concurring in opinion with the noble and learned lord, in the propositions which he has stated on the subject of this appeal, I shall only state in a very few words, the principle on which I proceed on this occasion; because, I am ready to admit, it is not on light grounds a Court of Equity, or any other Court, should question securities that have been entered into by persons of full age, and delivered under their hands and seals, for the purpose of securing the
payment

payment of debts that are due by them, and by which such debts are acknowledged to be due. But when a Court of Equity does on such occasions from all the circumstances before them, make such a decree as the Court of Exchequer did, and Mr. *Morgan* not appealing against that decree, if there was any foundation for it, it became necessary for the Deputy Remembrancer to take the accounts on the principle on which the decree directed them to be taken. And unless the Court of Exchequer had seen good reason for not holding the deeds, conclusive evidence against the party who had executed them, they would not have directed an account to be taken of what was due on account of the mortgages, distinct from the other money which had been advanced by Mr. *John Morgan*. The Court, however, did not see such reason, because of the circumstances that appeared in the cause, and on account of the relative situation in which Mr. *John Morgan* stood towards Sir *Watkin Lewes*.'

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'It therefore became necessary for the Deputy Remembrancer to pursue the principle of that decree, and not to receive the deeds and instruments which were so questionable, as conclusive, just as if there had been no such decree. And therefore most undoubtedly in that respect the exceptions ought to be allowed which question the mode in which the Deputy Remembrancer proceeded in the execution of the duty imposed on him by the Court of Exchequer.'

'And

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‘And here I may observe, that the mode of reviewing the proceedings in Courts of Equity, is very different from that of reviewing proceedings at law, for, in the latter case, there is no question of fact to be considered. The facts are not for investigation. In proceedings at law the jury are in the habit of ascertaining them, and in writs of error from those Courts they appear upon the record. But here the duty is to investigate facts, and I must consider it to be very unfortunate that it is so: and perhaps it well deserves consideration, whether some remedy might not be found; as whether a jury might not be had to apply their attention in Courts of Equity, to the examination of facts, as well as in Courts of common law, which would relieve you in appeals from Courts of Equity from the burthen now cast upon you of investigating facts as well as law.’

‘The Deputy Remembrancer had jurisdiction to examine the facts given him by the decree of the Court of Exchequer, and the Court of Exchequer having applied to his report a construction, which is in a manner inconsistent with a correct view of the evidence, and inconsistent with the principle of the decree, the consideration now before the House is, whether, on all the evidence before the Deputy Remembrancer, he has drawn the proper conclusion in point of fact, looking at the decree of the Court of Exchequer, which was the foundation of it. I conceive that he has not, and therefore I entirely concur with the noble and learned lord in the observations he has made on the evidence,
and

and in the propositions which he has submitted to the consideration of your Lordships.'

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Therefore the House of Lords ordered that so much of the decretal order complained of in the said appeal, as over-ruled the 1st, 2d, 3d, 4th, 5th, and 10th exceptions, taken by the appellant, should be reversed, and

As to the 1st exception, that it be allowed as to the Deputy Remembrancer's having certified that the defendant had advanced the plaintiff divers sums, the property of *Chardin Morgan*: and that it be referred back to the Deputy Remembrancer, *to review his report, and enquire and certify what sums were advanced by the defendant to the plaintiff, as the consideration of the bonds alleged to have been consolidated by the bond of the 28th of February 1775, for 2,400l., and when such sums were paid, and by whom, and to whom and in what manner.*

The 2d was wholly allowed.

As to the 3d—allowed, as to the 12s. 11d.; it appearing by the report, that such sum was not advanced by *the trustees*; and as to the remainder, that the Deputy Remembrancer should review his report respecting the 2,400l. and inquire and certify, when and in what manner the said bond for 2,400l. was *cancelled*, and whether the same was ever, and when, *delivered up to the plaintiff*.

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As to the 4th, allowed, as to 190*l.* (part of the 1,390*l.*) for *the same reason*.—The Deputy Remembrancer therefore was ordered to review his report, and enquire and certify, whether the trustees did ever, and when, and in what manner, receive from *Chardin Morgan* 1,200*l.* or any other or what sum of money for the *fen office bonds*, and bond of *John Adams*; and whether the said bonds were duly assigned and delivered to the said *Chardin Morgan*, and when and in what manner; and if the said trustees did receive the said 1,200*l.*, or any part thereof, from the said *Chardin Morgan*, whether they advanced the same, or any, and what part thereof, to the plaintiff, or the defendant, as his agent, and in what manner.

As to the 5th. That the Deputy Remembrancer should review his report, and inquire and certify, how far the application of 12,000*l.* set forth in the second schedule to his report, was consistent with or different from the account set forth in the answer of the defendant to the plaintiff's bill, and in such answer said to have been stated and settled by the said defendant with the said plaintiff.

As to the 6th exception. That the Deputy Remembrancer should enquire and certify, whether the several sums of 1,000*l.*, 300*l.*, and 120*l.* were ever, and when, and in what manner, received by the said defendant, from the said *Chardin Morgan*, for the use of the said plaintiff, and when,
 and

and in what manner, the said defendant first gave credit to the said plaintiff for such sums.

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The 10th exception was allowed.

On the 2d of *June* following (1807), the plaintiff applied to the Court for re-possession of the estates, on a suggestion, that the rents and profits had paid off the 8,000*l.* and interest, when the Court declared, that as the case was not a case of mortgage in possession; but that the plaintiff having himself by deeds under his own hand appointed the defendant receiver, and chalked out the mode of the application of the rents, namely, to keep down the interest of the 8,000*l.* and 4,000*l.*, and pay the residue to himself, and that as such deeds had not been in any way impeached, and that the defendant had applied the rents accordingly; and the plaintiff having acquiesced in such application for nineteen years—he could not, after such a length of acquiescence, apply to vary the mode of application.

On the 17th (*June*) the plaintiff again applied to the Court for re-possession, proposing at the same time the payment of 600*l. per annum*, as interest of the 12,000*l.*; but without prejudice to any question in the cause, when the Court, noticing, that besides the mortgages, *there were judgments* which affected the plaintiff's life estate, declared they could make no order out of the regular course, and refused the application.

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On the 2d of *July* following, the plaintiff applied to the Court for an order, directing the Deputy Remembrancer to take an account of the 8,000*l.* mortgage money and interest, and apply the rents to pay off the same; and afterwards a like account of the 4,000*l.* and interest, and apply the rents to pay off the same. When the Court again observed, that there were judgments as well as mortgages, and that the bill prayed a redemption on payment of all money due; that the duty of the receiver was to apply the rents and profits in payment of the interest of the judgments, as well as of the mortgages, as they equally affected the estates, and therefore refused the application.

On the 10th of *May* 1808, the Deputy Remembrancer made his second separate report *.

To

* And thereby certified as to what sums were advanced by the defendant to the plaintiff, as the considerations of the several bonds, consolidated by the bond of the 28th of *February* 1775, for 2,400*l.* the several sums mentioned in the first schedule, were advanced by the defendant *John Morgan*; or through his hands, to or for the use of the plaintiff, in part of the considerations of the said bonds at the several times, to the several persons, and in the manner therein stated, amounting to 1,976*l.* 19*s.*

And that over and above the principal money, secured by the said several bonds consolidated by the said bond for 2,400*l.* the consideration of that bond consisted of the sums advanced by, or through the hands of the defendant, to or for the use of the plaintiff at the times (23d *March* and 1st *April* 1775), and in manner (as stated in the report), *although subsequent to the date of the said bond*, (amounting to 209*l.* 14*s.*) and he certified, that no evidence had been laid before him

him of the cancelling of the said bond; but he found that the same was, on the 24th *February* 1777, delivered up to the plaintiff by the defendant.

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v.

MORGAN
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And he certified, that no evidence had been laid before him, that the trustees received from *Chardin Morgan*, the aforesaid 1,200*l.* for the fen office bonds, and bond of *John Adams*, or that the same were assigned to *Chardin Morgan*; but he found that the bond of *John Adams*, for 600*l.* was, on the 4th of *May* 1775, assigned by the defendant and *Chardin Morgan*, to the trustees in the said settlement, as part of the money agreed to be advanced by the defendant for the purpose of such settlements, and was, on the 6th of *July* 1775, paid off by *John Adams*, into the hands of the defendant; and that the fen office bonds, amounting to 600*l.* were, on the 5th of *May* 1775, delivered to the trustees as aforesaid, for the said *Amelia*, the wife of the defendant, then *Amelia Farrer*, spinster, as part of the money agreed by her to be advanced for the purposes of the said settlement, and some years afterwards sold by the defendant.

And he found that the application of the 12,000*l.* as set forth in the second schedule to his former report, was different from the account set forth in the answer of the defendant in manner stated in the second schedule to that his then report, but not inconsistent with the said answer.

And he certified, that no evidence had been laid before him, of the aforesaid 1,000*l.* 300*l.*, and 120*l.* being received by the defendant *John Morgan* from *Chardin Morgan*, otherwise than that in *April* and *July* 1772, *Chardin Morgan* sold 3,500*l.* bank 3 per cent. annuities, and in *January* 1773, 508*l.* 6*s.* 8*d.* like annuities, and 200*l.* and 50*l.* bank 3 per cent. annuities, of the year 1726, and that the money arising by such sales, amounting to 3,752*l.* 6*s.* 3*d.* was deposited by *Chardin Morgan*, in the hands of the defendant; and he did not find that the defendant gave credit to the plaintiff for the said 300*l.* and 120*l.*; but that on the 1st of *July* 1775, the defendant gave credit to the plaintiff for the said 1,000*l.* in the account set forth in the answer of the defendant, and settled the 24th of *February* 1777.

And he certified, that he had reviewed generally his former report, and saw no reason to change his opinion respecting

1817.

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LEWES

v.

MORGAN  
and others.

To that second report the plaintiff took five several exceptions \*.

[Before

the matters stated therein ; and that he had been and still was much impressed with the difficulty on the part of the defendant of substantiating at so late a period the considerations of the several securities, and *that there was a total want of evidence on the part of the plaintiff to show either fraud or imposition in the mode of obtaining them.*

\* 1st. That the Deputy Remembrancer ought not to have certified *that the several sums of money mentioned in the first schedule, were advanced by or through the hands of the defendant, in part of the considerations of the several bonds, consolidated by the bond for 2,400l. ; but ought to have certified that it did not appear to him that any money was ever advanced by the defendant to the plaintiff, as or for the considerations of such bonds,*

2dly. That the Deputy Remembrancer ought not to have made any report as to the sums, composing the 209l. 14s., (21st March and 1st April), there not being any order or direction for him so to do ; and, moreover, if such sums were advanced, the same were advanced on a general account.

3dly. That the Deputy Remembrancer had not certified, that he had reviewed his report, with respect to the 2,400l. part of the 6,610l. according to the directions in the said order, whereas that he ought to have certified that the only consideration for the mortgage for 6,610l. proved before him, was 4,209l. 7s. 1d., and that the same was the only money received by the defendant, as agent to the plaintiff, and the said trustees and the mortgagees, in respect to that transaction.

4thly. That after certifying that no evidence had been laid before him, that the trustees did ever receive from *Chardis Morgan* 1,200l. for the said ten office bonds, and bond of *John Adams*, he ought to have certified, that the said trustees did not advance the said 1,200l. to the plaintiff or to the defendant, as his agent, and that the sums of 4,209l. 7s. 1d. and 4,000l. received by the defendant of *James Morgan*, on behalf

[Before the arguing of those exceptions (21st of *June* following) the plaintiff again applied to the Court for re-possession of the estates, on the ground of the former motions, and which was refused for the same reasons.]

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 v.  
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 and others.

On the 20th of *December*, the Court, by the *Lord Chief Baron*, pronounced judgment on the exceptions, the substance of which was as follows:—

Judgment on  
 the exceptions  
 to the 2d separate report.

‘The great object the Court has had in view, has been to endeavour to possess themselves clearly of the meaning of the House of Lords, and comparing that with the report which has been made, to see whether it has satisfied the exigency of the order. The great anxiety of the House of Lords, seems to have been to ascertain with as much correctness as possible, the facts and transactions which have taken place as between these parties, and they seem to have thought, that the Deputy Remem-

beral of the said *Henry Wilder*, made 8,209*l.* 7*s.* 1*d.* which constituted the whole amount of the monies received by the defendant, as agent to the plaintiff and the mortgagees.

5thly. That he had not certified that he had reviewed his report as to the matter of the fifth exception, whereas he ought to have certified, that he had reviewed his report as to the matter of the said fifth exception; and that he found that the defendant, out of the said 8,209*l.* 7*s.* 1*d.* paid to the plaintiff 7,681*l.* 5*s.* 6*d.* only, and that no more was advanced by the defendant, to or for the use of the plaintiff, and that the said 7,681*l.* 5*s.* 6*d.* was the only principal money that was ever due from the plaintiff on account of the mortgagees.

1817.

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Remembrancer had not gone with sufficient minuteness into all the circumstances that belong to every part of the case, and that he was too general in his report.'

[His Lordship then proceeded to compare the two sets of exceptions, 1st, 2d, and 3d, (the old and new) and the subsequent report of the Deputy Remembrancer, observing, that it was the opinion of the House of Lords, that the bonds of which the 2,400*l.* was composed, were not in a case of this sort sufficient of themselves to shew, that there was good consideration for that consolidated bond, and that the House expected that it should be stated what advances were actually made by *John Morgan*, with all the circumstances, and that therefore the report was not in such strict compliance with the order as had been required.] 'Then (continued his Lordship) the House of Lords complain that the evidence is not stated: therefore we must require from the Deputy Remembrancer the same report, as they would have required if made to them directly, and not through the medium of this Court. Our order must be, that the Deputy Remembrancer shall state all the circumstances, the evidence of the times when, and the occasions on which such sums were severally and respectively advanced and paid, and by whom and to whom, and in what *manner*, for the manner will be extremely material, particularly with respect to those subsequent payments.'

'Whatever

‘Whatever monies were personally advanced ought not to have made any ingredient in this special account, according to the principle acted on by the House of Lords, who have directed, with respect to the 4th and 5th exceptions, that every branch of those shall be minutely reported, having it in view to dissect every item complained of in the whole exceptions, and therefore we must give such directions as shall best effect that object.’

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1817.  
  
 LEWES  
 v.  
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 and others.

As to the 1st and 2d exceptions, it was referred back to the Deputy Remembrancer to review his report, and enquire and certify what sums of money were advanced by the defendant to the plaintiff *out of his own proper money*, as the considerations for the several bonds, consolidated by the bond for 2,400*l.*, and when such sums were advanced and paid, and by whom, and to whom, and in what manner, and to state to the Court the evidence of such payments having been made to the plaintiff, or for his use.

And, as to the 5th exception, it was referred back to the Deputy Remembrancer to review his report, so far as might be necessary on reviewing his report as to the several other exceptions aforesaid.

On the 13th of *June* 1809, the Deputy Remembrancer made his third separate report, and thereby  
 certified

1817.  
  
 LEWES  
 v.  
 MORGAN  
 and others.

certified, that he had reviewed his report according to order\*.

To

\* And he certified, that the sum of 500*l.* was advanced to the plaintiff by *Chardin Morgan*, through the hands of the defendant, on the 31st of *January 1774*, the day of the date of the bond for that sum, in one gross sum.

And that the defendant did advance the several sums mentioned in the second schedule, amounting in all to 1,141*l.* 16*s.* to the plaintiff, out of his own proper monies, as the considerations *pro tanto*, of the several bonds for 220*l.* 120*l.* 950*l.*, and 400*l.*

And that the defendant, out of his own proper monies, paid to the Reverend *Henry Kent*, on account of the plaintiff, in respect of interest money, due from the plaintiff, 112*l.* 10*s.* by a bill of exchange, which was paid by Messrs. *Hoare*, on the 1st of *April 1775*; and that the defendant, out of his own proper monies, advanced to the plaintiff 16*l.* 4*s.* by draft on Messrs. *Hoare*, which was paid by them, on the 23d of *March 1775*.

And that the aforesaid sum of 2,400*l.* was part of the aforesaid 6,610*l.* and that the same was paid or advanced by the trustees to the defendant, as agent to the plaintiff, on the 2d of *June 1775*, by the said bond for 2,400*l.* being delivered up to the defendant as such agent by the trustees.

And that the bond of *John Adams* was, on the 6th of *July 1776*, paid off by him into the hands of the defendant, and that the ten office bonds were, some time after the date of the mortgage of the 2d of *April 1776*, sold by the defendant, and the produce was received by him.

And that he had reviewed his former report, and that it appearing thereby that the defendant had received the several sums therein mentioned, making together 12,000*l.* as agent to the defendant and the mortgagees, he did not find himself warranted by any evidence produced before him, to make any alteration in the said finding.

And

To that third report the plaintiff took seven several exceptions\*.

1817.

LEWIS

v.

MORGAN  
and others.

On

And that he had reviewed his report of the 10th of *May* 1803, and had referred back to his report of the 16th of *July* 1802; and that it appeared thereby, that he did thereby find, that the defendant, as agent to the plaintiff, had paid to him or to his use the whole amount of the 12,000*l.* in manner set forth in the second schedule to that report.

\* 1st. For that the Deputy Remembrancer ought to have certified, that no evidence had been laid before him, to shew that any sum of money had been advanced by the defendant *John Morgan*, to the plaintiff, out of his own proper money, *as the consideration of the bond of 500*l.**

2dly. For that there was no evidence before the Deputy Remembrancer of the advancement of the several sums mentioned in the second schedule on account of the said bonds, and even supposing them to have been advanced, they appear to have been advanced by the defendant upon a general account with the plaintiff; and the Deputy Remembrancer ought to have certified that no evidence had been produced before him, to shew that any money had been advanced by the defendant to the plaintiff, out of his own proper money, *as and for the considerations of those bonds.*

3dly. For that he ought not to have made any report as to the several sums of 112*l.* 10*s.* and 61*l.* 4*s.* (part of the sum of 209*l.* 14*s.*) there not being any direction so to do; and there was no evidence before him, that the said sums were advanced as part of the consideration of the bond for 2,400*l.* and the sums, even supposing them to have been advanced, were advanced on a general account with the plaintiff; and therefore ought not to form any part of the particular account directed by the order of the 20th of *June* 1801, *which was confined to such monies only as related to the mortgages and judgments, or were received by the defendant, as agent to the plaintiff and the mortgagees.*

4thly. For that there was no evidence of the *delivery of the bond for 2,400*l.** by the trustees to the defendant, as agent to the  
the

1817.

LEWES  
v.  
MORGAN  
and others.

1810.

28th May.

Judgment on  
exceptions to  
the 3d report.

On the 28th of *May* 1810, the Court gave judgment on the said exceptions, and thereby allowed the 1st, so far as the report stated the advance of 500*l.* to the plaintiff by *Chardin Morgan*, and referred

the plaintiff, or any thing to shew that the plaintiff had agreed that the same should form part of the 6,610*l.* And further, because the Deputy Remembrancer had before found (though unwarranted) that the advances made by the defendant on account of the consideration of four of the bonds comprising in part of the said bond for 2,400*l.* were personal advances by the defendant, and in part only of the considerations thereof, and consequently not within the meaning of the order of the 20th of *June* 1801; but the Deputy Remembrancer ought to have certified that the only consideration for the said mortgage for 6,610*l.* proved before him, was the said 4,209*l.* 7*s.* 1*d.*, and that the same was the only money received by the defendant, as agent to the plaintiff and the trustees, in respect to that transaction.

5thly. For that the Deputy Remembrancer ought not to have certified that the bond of the said *John Adams* was, on the 6th of *July* 1776, paid off by the said *John Adams* into the hands of the defendant, or that the fen-office bonds were some time after the date of the mortgage of the 2d of *April* 1776, for 1,390*l.*, sold by the defendant, and the produce thereof received by him, the same having no relation to the enquiry directed by the order of the 20th of *June* 1801.

6thly. For that the Deputy Remembrancer ought to have certified that the said 4,209*l.* 7*s.* 1*d.*, with the aforesaid 4,000*l.*, making 8,209*l.* 7*s.* 1*d.*, constituted the total amount of the mortgage money received by the defendant, as agent as aforesaid, in respect to the mortgage transaction.

7thly. For that the Deputy Remembrancer ought to have certified that the said defendant had, out of the 8,209*l.* 7*s.* 1*d.* paid to the plaintiff 7,681*l.* 5*s.* 6*d.* only; that no more was advanced by the defendant to or for the use of the plaintiff, and that the said 7,681*l.* 5*s.* 6*d.* was the only principal sum of money that was ever due from the plaintiff on account of the several mortgages.

ferred it back to the Deputy Remembrancer to review his report as to the other part of the said exceptions, and *state to the Court all the evidence* adduced before him as to what money was advanced by the defendant to the plaintiff, as the consideration of the bond for 500*l.*, and when, and by whom, and to whom, and in what manner.

1817.

LEWIS  
v.  
MORGAN  
and others.

And to review his report generally as to the 3d and 4th exceptions, according to the directions before given on the 1st exception.

The 5th exception was over-ruled.

And as to the 6th and 7th exceptions it was referred back to the Deputy Remembrancer to review his report, so far as should be necessary on reviewing his report in regard to the reference back to him of the other exceptions.

On the 11th *July* 1810, the following order was made on motion by consent:—That it should be referred to the Deputy Remembrancer to take an account, and make a separate report of the principal and interest due to the defendant, and to *James Morgan* and *H. Wilder*, upon the securities, together with the costs directed by the decree to be taxed, with legal interest from the filing of the plaintiff's bill in 1783, deducting and giving credit for the rents and profits of the estates, and other monies received by them. And that in taking the said accounts the usual half yearly.

1817.

Lewis  
v.  
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and others.

yearly rests to be made, and the surplus applied, after keeping down the interest of all the said monies, in reduction of the principal monies; and that upon payment of what should be found due upon taking such accounts, with the costs, that the defendant and the mortgagees should deliver up possession of the estates, and execute a proper re-conveyance to the plaintiff by a short day to be appointed by the Court.

On the 25th of *June* 1811, the Deputy Remembrancer made his 4th separate report \*.

To

\* He thereby certified, that he had reviewed his report with respect to the 1st exception, and according to the evidence adduced before him, he found that the sum of 500*l.* was advanced to the plaintiff as the consideration of the bond, dated the 31st of *January* 1774, by the defendant *John Morgan*, out of his own proper money, on the 31st *January* 1774, in bank notes, and paid into the hands of the plaintiff.

And that he had reviewed his report as to the 2d exception; and that though he found that the several sums mentioned in the second schedule to his former report, amounting to 1,141*l.* 16*s.*, were advanced by the defendant to the plaintiff, yet that he did not find that any of the sums were advanced as the particular consideration for any of the bonds in his report mentioned, no evidence of that fact having been produced before him, and none of the said bonds corresponding with the sums for which such bonds were given, and none of the said advances appearing to have been made at the respective times such bonds bear date, excepting in one instance, namely, where a sum of 25*l.* appears to have been advanced on the 18th of *November* 1794, on which day the bond for 750*l.* bears date.

And that he had reviewed his report as to the 3d exception; and although from the evidence adduced before him as to the advance of the two sums of 112*l.* 10*s.* and 61*l.* 4*s.*, he found that the said two sums were advanced by the said defendant

To that report the plaintiff took five exceptions\*.

1817.

LEWIS

,

MORGAN  
and others,

On

defendant to or for the use of the plaintiff; yet that he did not find that the same were advanced as the consideration of the bond for 2,400*l.*, no evidence of that fact having been produced before him.

And that he had reviewed his report as to the 4th exception, and was still of opinion, from the evidence set forth in the fourth schedule to that his then present report, coupled with the nature of the dealings between the plaintiff and the defendant, all in conformity with the answers of the mortgagees and the defendant, and uncontradicted by any evidence on the part of the plaintiff, that the delivery up of the bond for 2,400*l.*, on the part of the mortgagees, was, by consent of the plaintiff, part of the consideration of the mortgage for 6,610*l.*, and that the other part was 4,209*l.* 7*s.* 1*d.* and 12*s.* 11*d.*, and that the said 4,209*l.* 7*s.* 1*d.* was the only money received by the defendant, as agent to the plaintiff and the trustees (the mortgagees), in respect to that transaction,

And that he had reviewed his report as to the 6th and 7th exceptions; and in consequence of having reviewed his report as to the subject-matter of the other exceptions, and having referred to his report of the 16th of July 1802, and to the order of the 20th of February 1807, and it appearing by the order that the sums of 12*s.* 11*d.* and 190*l.* were not advanced by the said trustees, he had deducted the same, and also the 2,400*l.*, making together 2,590*l.* 12*s.* 11*d.*, from the said 12,000*l.*, making a sum of 9,409*l.* 7*s.* 1*d.*, which he found constituted the amount of the mortgage-money received by the defendant, as agent to the plaintiff and the trustees (the mortgagees) in respect to the mortgage transactions.

The whole of which 9,409*l.* 7*s.* 1*d.* with the 2,400*l.*, 190*l.*, and 12*s.* 11*d.*, making in all 12,000*l.*, he found to have been applied by the defendant, as agent to the plaintiff, in manner stated in the second schedule to his report of the 16th of July 1802.

\* 1st. For that the Deputy Remembrancer ought merely to have stated the evidence adduced; and read before him, as to what

1817.


 LEWES

v.

MORGAN  
and others.

On the 6th of *June* 1812, the Deputy Remembrancer, in pursuance of the decree, and of an order

what money was advanced by the defendant to the plaintiff, *as and for the consideration of the bond for 500l.*, and when such money was advanced and paid, and by whom, and to whom, and in what manner; and the Deputy Remembrancer *ought to have certified that no evidence had been produced or laid before him, by which it might or did appear that the said 500l., or any money had been advanced by the defendant to or for the use of the plaintiff, out of his own proper money, as and for the consideration of the said bond.*

2d. For that the Deputy Remembrancer was not directed or required by the said order of the 24th of *May* 1810, to give any opinion upon the evidence adduced and read before him, but merely to review his said former report as to the matter of the 4th exception taken by the plaintiff thereto, according to the direction therein before given on the reference back of the 1st exception thereto; and it appeared that the evidence stated in the fourth schedule to his former report, coupled with the nature of the dealings between the plaintiff and the defendant, were not all, or in all respects, in conformity with the answers of the mortgagees and the defendants.

3d. For that the Deputy Remembrancer *ought to have deducted from the 9,409l. 7s. 1d. the sum of 1,200l. arising from the sale of six fen-office bonds and bond of John Adams*, in as much as no evidence had been laid before him, to shew that the trustees did ever receive the said 1,200l., or that the same was paid by them to the plaintiff, or to the defendant, as his agent; and he ought to have found that 8,209l. 7s. 1d., being the remainder of the said 9,409l. 7s. 1d., after deducting the said 1,200l., constituted the total amount of the mortgage-money received by the defendant, as agent to the plaintiff and the mortgagees, in respect to the mortgage transactions.

4th. For that the Deputy Remembrancer ought to have found that the defendant, out of the said 8,209l. 7s. 1d. paid to the plaintiff 7,681l. 5s. 6d. only, and that no more was advanced by the said defendant to or for the use of the plaintiff; and

order of the 6th of *May* then last, made his *report of the costs by the said decree directed to be taxed*, and thereby certified that the defendant brought in before him at different times, and left in his office, his bills of costs (thirty in number), and that he had been attended by the clerk in court for the defendant, and by the defendant in person, and by the clerk in court and solicitors for the plaintiff, and in their presence had considered of the bills of costs, which bills, *amounting together to the sum of 4,245l. 3s. 3d.* he had taxed at the sum of *3,829l. 0s. 6d.*, in respect whereof he found the defendant to have received several sums of money and securities for money, amounting in all to the sum of *2,034l. 1s. 1d.*, leaving a balance of *1,794l. 19s. 5d.* due from the plaintiff to the defendant, in respect of the several bills of costs; and that he had in the second schedule thereto annexed, set forth an account of the several sums of money and securities received by the defendant in respect of such bills.

That

and that the said *7,681l. 5s. 6d.* was the only principal money that was ever due from the plaintiff on account of the said several sums of money.

5th. For that the Deputy Remembrancer *had not set forth all the evidence produced* and offered to be read before him, respecting the matters of the 6th and 7th exceptions to his report of the 13th of *June* 1809, and particularly respecting the sale of the fen-office bonds, and the application of the monies arising by such sale; and had also omitted to state many material evidences respecting the said fen-office bonds, which had been discovered since the order of the 24th of *May* 1810, and which evidence were offered to be produced before the Deputy Remembrancer by and on behalf of the plaintiff.

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v.MORGAN  
and others.

1817.

LEWES  
v.  
MORGAN  
and others.

That report having been confirmed, the defendant required the Deputy Remembrancer to proceed on the order of the 11th of *July* 1810, but he refused to do so pending the separate report.

1813.

5th July.

Judgment on  
the exceptions  
to the 4th se-  
parate report.

The Court now pronounced judgment on the exceptions taken to the fourth separate report, which had been argued in *April* 1812, delivering their opinions *seriatim*.

WOOD, *Baron*. 'In this cause of *Lewes v. Morgan*, as there is a difference of opinion, it becomes necessary to give our reasons separately. This comes on by way of exceptions to the Deputy Remembrancer's report as to the money due upon three mortgages. Exceptions have been multiplied upon exceptions, till the case has become almost unintelligible; but still, I think, there is no difficulty in the merits of the case. Sir *Watkin Lewes*'s attempt is to strike out of the mortgage-money for 6,610*l.* the several sums of 2,400*l.* and 12*s.* 11*d.*, and totally to set aside the mortgage for 1,390*l.*, making together 3,790*l.* 12*s.* 11*d.* But the mortgage for 4,000*l.* the plaintiff's counsel say, they do not dispute. On what ground does the plaintiff attempt to dispute the other monies? Not because the money has not been advanced, for every shilling *has been advanced*. *He has allowed that under his own hand*. But he says, "part of "the consideration was personally advanced to "me by the defendant *John Morgan*, for his "clients the mortgagees, *William Farrer* and  
" *James*

"*James Morgan*; and he being my solicitor also, "therefore that part of the consideration ought "to be struck out of their mortgages, and constitute a separate account between myself and "the defendant;" or, in other words, he desires that the sums advanced by the defendant may be, if I may be allowed the expression, reduced to a simple-contract debt between the defendant *John Morgan* and himself, and that the defendant may be left without any security, and to recover it as he can, and that the plaintiff may be let into possession of the estates. This is the plaintiff's equity. On what principles of equity or justice this can be done, I am at a loss to discover.'

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'Now, for the better understanding of these exceptions, it will be necessary to state the general dealings between the plaintiff and the defendant, which gave rise to this suit, and also some of the antecedent proceedings.'

[His Lordship then entered at large into a minute detail of the various transactions of the case, and stated the pleadings fully; upon which, as he went along, he commented much to the same effect as in the judgment delivered at the conclusion of the present report, and therefore that part of the present judgment, which is of considerable length, is omitted.]

[Having brought the case down to the decree of 1796] his Lordship observed, 'If the plaintiff had  
 1 2 thought

1817.  
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thought fit to have proceeded upon that decree, there is no doubt that he would have acted wisely and properly, and by this time might have been in possession of his estates; but he did not think fit to carry it into execution; he made an application to the Court for a separate report, and in *June* 1801, there was an order for a separate report, which order is, "That the Deputy Remembrancer
 " should be at liberty to make a separate report
 " of all dealings and transactions between the
 " plaintiff and the defendant, so far as related to
 " *the monies received and paid on account of the*
 " mortgages and judgments in the bill mentioned,
 " and also of all sums of money received by the
 " said defendant as agent to the plaintiff, and also
 " to the mortgagees, and when and how such sums
 " of money were applied; and also an account of
 " the rents and profits received by the defendant."
 When the order for this separate report was made, I have no doubt it was obtained upon a misrepresentation of the merits of the case; it must have been represented that the said defendant was keeping possession of the estates, not merely to satisfy the mortgages and judgments, but also for other monies which were no lien on the estates: if that had been the case, it would have been right that he should not keep such possession, but that the plaintiff should be let into possession upon paying the monies that were a lien upon the estates; but there was no ground for such suggestion, because the defendant was not let into possession of the estates for the security of any thing
 but

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but what was a real burthen and lien upon those estates. Could the Court ever imagine that by the order for that separate report, the money advanced forming a part of the mortgages, should be struck out of the mortgages, and be reduced to a simple-contract debt? The order, I apprehend, does not import any such thing; but that is the use that is attempted to be made of this order and report, and which, I think, is a perverted use of it. In *July 1802*, the Deputy Remembrancer made his separate report accordingly, in which he charged the defendant *John Morgan* with the whole of the mortgage money of 12,000*l.*, as actually received by him for the plaintiff's use; and on the other hand, he allowed him in his discharge all the money he had actually paid and disbursed on the plaintiff's account. Is not this perfectly right? He certifies the facts of the case to be thus—that *the plaintiff had* applied to the defendant to raise money upon his estates, and that the defendant had advanced to the plaintiff property belonging to his brother *Chardin Morgan*, and took the plaintiff's bond to the said *Chardin Morgan* for securing the re-payment thereof with interest; which bonds were afterwards consolidated by the plaintiff's executing to *Chardin Morgan* a bond, dated the 28th of *February 1775*, for payment of the sum of 2,400*l.*; and he then finds that the plaintiff gave a mortgage for 6,610*l.*, which consisted of this bond for 2,400*l.* among other sums. The plaintiff, I think, took ten exceptions to this report. The Court over-ruled all those exceptions. The plaintiff appealed to the House of

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Lords, and the House of Lords allowed some of the exceptions, but directed further enquiry with respect to the others; and upon that it now comes for the consideration of the Court.'

[His Lordship then investigated minutely and elaborately the merits of the different reports as brought under the revision of the Court by the several exceptions taken to them; but, on account of the great length to which that investigation was extended, and its relating in the result entirely to the enquiry of *the facts*, as to what sums or parts thereof had been advanced to the defendant as agent for the plaintiff, it may be sufficient, for the purposes of this case, to observe generally that his Lordship considered the reports well founded, both as to the evidence of the facts, and the conclusions deducible therefrom—that it could make no difference *who* advanced the money provided the defendant paid it over to the account of the plaintiff—that the distinction taken between the separate and general report, as it might affect the estates, was unfounded in reason or equity; for that the estate was pledged for the whole 12,000*l.* actually advanced by *Morgan*—that the exceptions, as far as they went to impeach the truth of reports, were founded on fallacies—and that whatever might have been the intention of the House of Lords, it could not be that the estates should be exonerated from any of the sums within the amount of the 12,000*l.* advanced by *Morgan* himself on account of Sir *Watkin*—his Lordship holding, that the money paid by *Morgan* for Sir *Watkin Lewes* up to the 12,000*l.* ought to be

be all repaid before the estates could be redeemed, whether advanced by *Chardin Morgan* or *John Morgan*, or the remotest stranger.]

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[As to the evidence his Lordship considered, that it was abundantly sufficient to sustain the reports, and he particularly adverted to the settled account (by which it appeared, that the defendant had accounted for every farthing of the money), and to *Morgan's* books and the slips of paper, and he insisted that the delivery of the fen-office bonds, and the bond of *John Adams*, by the trustees to the defendant, and his having accounted to the plaintiff for the amount, was equivalent to a payment of so much money to him by the trustees for the use of the plaintiff.]

‘Through the whole of this long cause (said his Lordship), it has appeared to me that the plaintiff has been labouring to deprive the defendant *John Morgan* of a considerable part of a just demand. Upon the order for a separate report, and upon the decision of the House of Lords upon the exceptions to the first separate report, it has been stated to us, that this is a peculiar and extraordinary case; that the defendant *John Morgan* was attorney to the plaintiff; that he was his banker, and that he was agent for the mortgagees; and that filling all these characters, we must infer that he is a rogue. It has been said, you must necessarily infer fraud from his situation. That is rather uncharitable, and I think it is not equitable. I know no principle either in law or equity, that requires me to

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infer that an attorney must charge his client, or an agent his principal, or a banker his customer fraudulently: or that a solicitor who happens to be concerned for both mortgagor and mortgagees must necessarily act fraudulently. I know that, in certain cases, a Court of Equity will not permit an attorney to sustain all these characters: and that I can understand as founded upon good and sound principles of policy. But I know of no principle either of law or equity prohibiting an attorney from lending money to his client, or a banker to his customer, and taking a bond as a security, or entering it in his own name, or in the name of any other person, either at the times the money was lent, or at subsequent periods. What difference can any of these circumstances make to the borrower, if he has the money for which he gives the security? What matters it to the plaintiff in whose names the bonds were taken, or from whom he received the money, if he has received it, or has had it applied to his use? It has been argued, as if the House of Lords had decided, that the sums of 2,400*l.*, 1,390*l.*, and 12*s.* 11*d.*, were to be struck out of the mortgages, and reduced to the degree of a simple-contract debt, as not constituting any part of the sums secured by the mortgages; and that the lender of those sums was not to have the security for which the mortgages were made. This, in my understanding, is not the meaning of the expressions of the House of Lords; and I rather apprehend, my learned brothers and myself differ more upon the meaning and effect of this order of the House of Lords, than

than upon the real merits of the case. Lord *Redesdale* has certainly gone upon the supposition, that there were two accounts between the plaintiff and the defendant; one a mortgage and judgment account, and the other a general account uncovered by the particular securities; and Lord *Redesdale* supposed, that this Court, by ordering a separate report, meant that the Master in taking the mortgage and judgment accounts should distinguish them, and that he should also distinguish how much of the money was personally advanced by the defendants, the mortgagees, and how much was personally advanced by the defendant. The House were of opinion, that the Master had not done that according to the meaning of this Court, and they direct the Master to enquire, whether the 2,400*l.* was advanced by the defendant *John Morgan*; and they declare that the small fractional sum of 12*s.* 11*d.* to make up the sum of 6,610*l.* was not advanced by the defendants *William Farrer* and *James Morgan*, but by the defendant; and they further declare, that the sum of 190*l.* was not advanced by them, but by the said defendant; and they direct an inquiry, whether the 1,200*l.* was advanced by the defendants *William Farrer* and *James Morgan* to the plaintiff, or whether it was advanced to the defendant as his agent, and for his use. Lord *Redesdale* certainly found himself under difficulties, on account of the separate report, and the want of the general report; and therefore he says, the Master has charged the plaintiff with sums of money,
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under circumstances, and on the faith of instruments, which this Court considered to be suspicious. But his Lordship does not suppose that this Court meant to set the securities aside, or that the securities ought not to be received as evidence, and therefore further inquiry was to be made as to the effect of them. I should observe here, that the order for the separate report, obtained by the plaintiff, involved their Lordships in considerable difficulties; for if the whole of the case had been considered in one point of view, the objection I have stated, namely, whether the 2,400*l.* was the defendant's money, would not have occurred; but that order having been made, and this Court having over-ruled the exceptions to the first separate report, their Lordships had only to decide whether they were well founded; and we must endeavour to get at that as well as we can. If Lord *Redesdale* had meant that the money advanced personally by the defendant should be struck out of the mortgages, his Lordship would have said so, and any inquiry whether the money was advanced by the said defendant would have been perfectly useless. Now I conceive the order of the House of Lords imported no more than this—inasmuch as we do not consider those monies in point of law as proved, let the Master state what money has been advanced by the defendants, the mortgagees, and by the defendant *John Morgan*, forming the consideration of the mortgages, and thereby enable this Court to make their ultimate decree. The Master upon clear evidence has
found,

found, that all these sums were duly advanced by the defendants, the mortgagees, or paid by the defendant, and the evidence in my judgment warrants this finding. I have looked at the order of the House of Lords, and I will state what it is they ordered, and what I take to be the meaning of it:—[Here his Lordship read the order as far as relates to the 1st and 2d exceptions, p. 97.] Thus all that the House of Lords say is, that the money which is stated in the report to be the property of *Chardin Morgan*, was not the property of *Chardin Morgan*, but was the property of the defendant. The Deputy Remembrancer has made his report, and has stated particularly when and how, and in what manner it has been advanced. The House of Lords then go on and say, that the sum of 12s. 11d. was not advanced by the defendants *William Farrer* and *James Morgan*, the trustees in the marriage settlement of the defendant *John Morgan* and his wife—that is, the sum of 12s. 11d. which was added to make up an even sum of 4,210l. They also say that this was not advanced by the defendants the mortgagees, but by the defendant *John Morgan*. Be it so—still it makes a part of the consideration: it is a fractional sum personally advanced by the defendant to make up an even sum. [His Lordship then read the rest of the order allowing the other exceptions.] The Master has reported that the whole of that 12,000l. has been advanced for the use of the plaintiff, and therefore, in my opinion, he has complied with every thing that was intended by the House of Lords. The
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House of Lords have not in any part, that I can find, directed that the money advanced by the defendant should be expunged; the House of Lords have not directed what we are to decree, nor what the ulterior decision should be, and we must make that decree which upon consideration of the whole case we may think we ought to make; and I have no hesitation in saying, that I think the plaintiff's exceptions ought to be disallowed, and that he cannot be let into the possession of the estates but upon payment of the 12,000*l.*; and this, I think, is not contrary to the decision of the House of Lords.'

THOMSON, *Baron*, was absent.

GRAHAM, *Baron*. 'It is not to be wondered at that a case of this sort should present itself in different views to those whose duty it is to decide upon it, and a case which, really considering the various proceedings that have taken place, I may fairly say, almost exceeds the comprehension of the human mind. I will endeavour to be as short as I can, because, perhaps, the shorter one is upon a subject of this sort, the more distinct and clear will the decision appear, and that is the more necessary, when there is a probability that the judgment we may form may undergo discussion elsewhere. It is undoubtedly true, that this bill, in its original shape, did not seem specifically to apply itself to those circumstances, which a further investigation of these numerous accounts have disclosed to us. The bill, as it was originally framed,  
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does undoubtedly pray a general account of all the transactions between the parties, that Sir *Watkin Lewes* may be let in to redeem his pledged estates, upon the terms of what should appear on the general account to be due to the parties; but although the bill was so framed, and prayed such relief, I, for one, am by no means disposed to say, that if the party, unable to distinguish all the circumstances that attended that case, should impose upon himself and his property improvident terms, and if, in the result a Court of Equity should be of opinion, that he had so incautiously pledged his estate for that for which it was not liable to be pledged, the Court should hold the party strictly to the tenor of the bill;—and still less where he sues not only for himself, but for his infant child, towards whom, unquestionably, in its utmost rigour, those terms could not be supposed to extend; but whatever was the original object of the bill, it began to take a new complexion when the cause came on for hearing, and although the decree does not so directly point to a separate consideration of the several mortgages and judgments, I could, but for an willingness to take up the time of the Court, advert to specific directions of that import to be found in the decree, which cannot, in my apprehension, be controverted. But passing to the order for the special report, I am utterly at a loss to account for the directions which are given with regard to that report, but upon the supposition that at the time when that order was made, the Court did see very strong reasons to suppose that the whole of this sum of

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6,610*l.*, and the whole of the 1,390*l.* had not, in point of fact, been advanced by the trustees, to whose credit they are placed in this cause. Those particular directions, according to my apprehension, are not otherwise to be construed than in that view, and it is not, perhaps, to be wondered at, that at the time of making the decree and the special report, the Court did not see the cause in that point of view, in which the subsequent inquiry has presented it, because, at the time of making the decree, the Court might not see so distinctly as it does at this moment what the case was. It was a case in which *John Morgan* himself, and his trustees, positively swear to an actual advance of 6,610*l.* paid by themselves in trust, and they swear, that the trustees of *John Morgan* actually paid down 1,390*l.* at the date of that mortgage in 1776, and placed it in his hands; and when the Court at that time saw the strong *prima facie* evidence, that presented itself, from the deed of mortgage executed by the parties, and from the settled account (about which so much has been said, and to which so little credit ought to be paid) it was impossible, till these items were gone into under the order for the separate report, that the Court could see the grounds on which they afterwards thought that the whole of the money had not been advanced by the trustees. It was clearly the direct object of that separate report, to divide the case into two distinct subjects of investigation. One, the account of monies advanced by the trustees, and the other, the general account between all the parties in the cause. Why it was that

that Mr. *Morgan* was induced to consent to that separate report, I cannot say, but it did of necessity lead to a partial view of the general circumstances of the transaction, and that was complained of in the House of Lords; but at the time when the cause was set down, and at the time when the order for a separate report was made, perhaps neither party was aware of the consequence, or that it would involve monies which belonged to the general account in the transactions between the parties. But whatever may have been my view of this case in its original shape upon the order, and upon the special report, it appears to me, that we have nothing further to do with that, than to understand distinctly how it has been adopted by the House of Lords, and how it has been acted upon there. Most undoubtedly the order for the special report was obtained on the idea that 6,610*l.* had been advanced by the trustees, and while the subject was in dispute, ten exceptions were taken, and every one of them went to the 2,400*l.* and the 1,390*l.* With regard to the 1,390*l.* they go to say, we dispute your advancing that sum either by *Chardin Morgan* or any body else, and if it was even advanced by you or *Chardin Morgan*, we still say, if it was the advance of *Chardin Morgan* for your benefit, and that that, as well as the 2,400*l.* never constituted part of the mortgage money, because it never was the property of the mortgagees; that is the ground of all these exceptions, and part of these ten exceptions now come on before us, our former judgment having been corrected

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rected by the House of Lords (when, before we had the advantage of my brother *Wood's* assistance in this Court, we had over-ruled all those ten exceptions), on an appeal by the plaintiff upon the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions. It now seems to me, that in all the perplexity of this complicated matter, and the different conceptions that have occurred to different minds, the great and the only point for us to consider at present, is, what is the effect of the judgment of the House of Lords, and what they have decided; because the view which they have taken upon this subject must be the basis of all our subsequent decrees, and of the ultimate disposal of this cause; and therefore I have, perhaps, wasted time in shewing what my view of the original transaction was; but though I was not a party to the original decree, I wish it to be understood, that my opinion is, that the decree was well founded; however, I now take my stand upon the order of the House of Lords. Perhaps it may be a matter of some kind of doubt, whether we are truly informed as to the particular language, and the particular opinion of any one member of the House, and I shall therefore forbear from stating it; and no man knows better than myself, the justness of comprehension, and the intelligence of the mind that was exercised upon this complicated subject; but I will not interpose his authority at all, on the present occasion, but simply guide myself, and abide entirely by what the House of Lords have done.'

'Now,

Now, we must first observe, that at length Mr. *Chardin Morgan* is entirely out of the case, and the defendant is standing in a variety of relations, all of which require, on his part, a just and perfect accuracy in his statement of accounts; because, calling upon him particularly for that account from the first to the last, even up to this period, it has been sworn again and again, that the advances in the name of *Chardin Morgan* were of his money, and that goes a great way to impeach the settled account. Then we have a subsequent report, in which it was represented to be the money of *Chardin Morgan*, and it was not till a new set of exceptions were filed in this Court that that was got rid of; and then the report states, that no part of the money was advanced by *Chardin Morgan*. We thus, therefore, after a great expence, have got rid of that. [His Lordship then took a view of the general object of the exceptions, which he considered as founded on the doubt, which the House of Lords entertained, of the advance of the money by the defendant, and as to which the order directed an enquiry, observing particularly on the disallowance of the 12*s.* 11*d.*, and the reason given for it—that it was not advanced by the trustees: making the same observations as to the disallowance of the 190*l.* part of 1,390*l.* apparently part of the mortgage, and for the same reason: and then he adverted to the defendant being appointed receiver to the estates, and being engaged in business for Sir *Watkin Lewes*, as his attorney, when he was paying himself by money in hand, although

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he was charging him with interest at 5 *per cent.* under the name of his trustees, on the money said to be advanced by them. And his Lordship declared his opinion of the object of the House of Lords, as to the other exceptions, to be, to direct an enquiry, whether the trustees were ever, in point of fact, at any time possessed of these fen-office bonds, and the bond of *John Adams*, and whether they converted them into money, and whether they cashed those bonds, and whether, having done so, they did, on the 2d of *April 1776*, pay the money actually over in cash to *Morgan*.]

‘Now, with regard to that (continued his Lordship), there is not in my view of the case a tittle of evidence to prove those facts, or that the trustees of this marriage settlement ever did, in point of fact, receive the money from Mr. *John Adams*, or when they did receive it. I perfectly agree with my brother *Wood*, that the money might have been advanced, but there is no assignment whatever to the defendant. What was there to prevent him, when he had advanced the 1,390*l.* from getting a declaration from the trustees, that they were his own advances, and that he had advanced the 1,390*l.*? The House of Lords therefore say, let us know that it was a *bonâ fide* transaction; the sequel of the cause is, that they did not advance the 1,390*l.* in money; it was Mr. *Morgan*’s personal advance, and he shall not be allowed to come in under cover of a trustee, and receive interest at 5 *per cent.* when this is the state of affairs between him and

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Sir *Watkin Lewes*. But it is said, and undoubtedly with great weight, if the House of Lords, in saying that 12s. 11d. and 190l. shall be disallowed, as making part of the mortgage, what had that to do with enquiring what advances were made upon the 1,390l. It is quite clear the House of Lords could not have been of opinion, whether the money was advanced by the trustees, or whether it was advanced by *John Morgan*, that it should nevertheless stand as part of the mortgage, because then they would have said so. But if the House of Lords had considered Sir *Watkin Lewes* bound by these various mortgages, (stating them) and the supposed settled account, why, all these enquiries? Can we—when the House of Lords have totally set aside these instruments, as not concluding Sir *Watkin Lewes*, having ordered them to be particularly enquired into, to the extent of the 2,400l. and the 1,390l.—take upon ourselves to say, no, we will do what you ought to have done, and we will bind the party by the instruments.'

'Then, under what circumstances is this settled account made?'

'In the first place, it purports to be a general account, signed by Sir *Watkin Lewes*, on the 24th February 1777, and it appears, that Mr. *Morgan* had contrived that all this money should pass through his hands. At the time he was supposed to be settling these accounts with the mind a man should have, who would look into accounts so complicated, he was himself a creditor of Sir *Watkin*

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*Lewes*, for the sum of 622*l.* for which he was ready to bring his action, or to have snapped a judgment when Sir *Watkin Lewes* was unassisted by any one. It is admitted, that the defendant was the agent of the plaintiff, and the agent of the trustees; he appeared in all these characters, and he assumes himself also to be the banker of Sir *Watkin Lewes*, and, as I apprehend, much against his will; for he appears to have been desirous of getting the money out of his hands; but the defendant, acting in all these situations, and the plaintiff not having possession of any one book that could assist him, can what was done under such circumstances be supposed to be binding upon Sir *Watkin Lewes*?

[His Lordship then went into the account in much the same manner as in his judgment of the 18th *November*, instant, and drew the same conclusions.]

‘ Now, with regard to these exceptions, I am disposed to over-rule the first; for I have been furnished with no objection to the fact of the consideration of the first bond having been advanced. With respect to the 1,141*l.* 16*s.* I am likewise disposed to over-rule the exception to that, for I do not think that there is any fault to be found with the report on that ground. Then the third exception is, that *John Morgan*, out of his own money, had paid the sum of 112*l.* 10*s.* and 61*l.* 4*s.* With regard to these advances, I am not prepared to say there is any objection. Then comes the fourth exception,

exception, and the reason that is given is, that there was no evidence that the 2,400*l.* forms a part of the consideration. Now, the Deputy Remembrancer answers that exception, by reporting that he does find evidence that it was so agreed, so that the whole of the argument that goes to over-rule this exception is, that the Deputy Remembrancer has found ground for some of these instruments, and that the plaintiff did agree that the 2,400*l.* should stand as part of the 6,610*l.* I agree, that the Master has answered satisfactorily, and that a very bad reason was given for the exception; but the substantial ground of the exception was, (following the order of the House of Lords) that it ought not to have been reported at all; and certainly the answer that was given to the argument against this exception, seems to me to be perfectly sufficient, viz. that it never was referred to the Deputy Remembrancer, to enquire, whether any such agreement was come to; the reference was, whether such sum of money was advanced, and whether it constituted, under the circumstances of the case, part of the 6,610*l.* And therefore, with regard to that exception, as to his having allowed the 2,400*l.* to stand as part of that mortgage, I am of opinion that it should be allowed.'

'Then, with respect to the 5th exception, as to the 1,200*l.* I think that should be allowed. The reason of my opinion is, that there is no evidence to shew, that the trustees were possessed of the 1,200*l.* in clear cash. On that account, that must not stand as part of the money advanced on the mortgage.

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mortgage. Therefore, with respect to the 5th and 6th exceptions, I am disposed to allow them. The 7th and last exception, I think may be overruled\*. My opinion therefore, as it is applied to these different exceptions, is, that the 2,400*l.* and the 1,390*l.* must be expunged from the mortgage, and that, in other respects, the report may stand.'

MACDONALD, *Chief Baron*. (Having said that he had intended to have written something more methodical than he should probably be able to state from memory, but was prevented from the state of his eye-sight.) 'In my consideration of this case, as far as the present subject is concerned, it is not very intricate; for it seems to me, that the only duty that I am at present called upon to perform is, to see whether the sums which the House of Lords have thought absolutely necessary to charge on Sir *Watkin Lewes's* estates (not on himself, but his estates), and which I shall presently mention, have been shewn to the Court by the Deputy Remembrancer to have been actually advanced, as a substantial ground for the opinion that he has reported to us. (His Lordship then stated the original transactions.) I take the House of Lords to have reasoned upon those facts thus. This mortgage, as far as the 2,400*l.* goes, rests upon the bond due to that amount, but no such sum of money was actually paid as the consideration for the

\* His Lordship appears to have taken into consideration the exceptions to the third separate report, at the same time, as being the ground-work of the exceptions to the fourth.

the mortgage. They say too that the bond itself consists of the five component sums said to have been advanced on former bonds. They then lay the axe to the root, and say, we must see not merely that those bonds were executed, for undoubtedly they were; but we must see, that a good consideration in money was paid for those several bonds, and that is the gravamen of this point on the part of Sir *Watkin Lewes*; and I cannot agree with those who think it is the same thing, whether these bonds were given in the course of an account current, between the defendant and the plaintiff, or whether hard cash was given upon each occasion, when these bonds were executed; because that would make a great difference in point of interest, but, besides that, the House of Lords meant it as a test, to see whether the transaction was true in point of fact. Then be it that the mortgage was executed; be it that Sir *Watkin Lewes* consented that the 2,400*l.* should form a part of the mortgage, still the present purpose is to enquire, whether there is sufficient to shew, that at the time these bonds were executed, the money was actually paid. According to my own opinion, the evidence of that fact is not carried one jot further than it was when the case was before the House of Lords. I shall not take up each exception one after another, but advert to the two great sums, which constitute the subject-matter of the four principal exceptions, namely, the 2,400*l.* and the 1,390*l.* With regard to the 2,400*l.* the first of these bonds that were given to make up that sum, is a bond of 500*l.*

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Now upon what evidence does that stand? I would first of all observe, that the existence of the bond, and all the evidence relating to it, is quite out of the question, and that the accounts are not kept in such things as are called books; but they are kept upon scraps of paper in such a way as no man of business would keep accounts, and interest is charged upon them. I admit that that constitutes a vast body of the evidence now before us; but granting all that, the question still recurs, which the House of Lords have put. Was there a pecuniary and valuable consideration paid for these bonds at the time they were executed? With respect to the 500*l.* what was the evidence? I do not stop here to say any thing upon the admissibility of Mr. *Morgan's* own books, or the scraps of paper that have been given in on his part. The House of Lords have adverted to it, but I think it of no consequence at all to this question. The first piece of evidence is a small scrap of paper, amounting to no more than a mere assertion of Mr. *Morgan*, that this money was paid to Sir *Watkin Lewes*. It is a very dark transaction. Who borrowed the money? Who gave the security for it? We have no insight into these things at all; the rest of the evidence goes to shew, that in other books and papers it was treated as an existing bond; but that does not solve the doubt, whether the money was advanced for the plaintiff. So much for that bond. There was no evidence of any consideration having actually passed to Sir *Watkin Lewes*, when the bond was executed. With respect to all the others they stand upon one simple ground.

ground. The Deputy Remembrancer has reported, and properly reported, that the monies were advanced; but there is nothing to shew that any money passed at the several times when the bonds were executed. Now, let me read the requisition of the House of Lords to the Deputy Remembrancer.' (His Lordship read the order.)

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'Does not that order intimate that the House of Lords were of opinion that this was not like any other transaction of bonds executed, where the money is actually paid at the time? That requisition can never be satisfied by producing a long catalogue of sums, such as has been produced here. It appears to me most manifest, that the House of Lords considered this an allegation on the part of the defendant, that the money was actually paid down at the time these bonds were executed; and that is not proved, as I said before, by giving us that which is mere assertion. This, I conceive to be by no means shewing to the Court, in the manner that was expected by the House of Lords, what money was *bond fide* advanced in any one instance at the time these bond transactions took place. I pass on therefore to the 1,390*l.* Of that the House of Lords have disposed of 190*l.*, and struck it out of the account, as being a personal advance by the defendant. Now, with respect to the two 600*l.* bonds, the House of Lords have considered that *Chardin Morgan* should have come with 1,200*l.* in his hand, and handed it over to Sir *Watkin Lewes*, or his agent. Then the only evidence they have given with respect to that

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that is, that these bonds were some of them paid, and others were assigned; but according to the view the House of Lords have taken of it, what has the plaintiff to do with what became of those bonds after the defendant became the purchaser of them? If he bought them, he was master of them, as soon as they were assigned by *Cherdin Morgan*. The only question therefore is, whether he received the 1,200*l.*, and of that there is no evidence but assertion, in the form of a memorandum upon the back of the marriage-settlement. *Sir Watkin Lewis* knew nothing of it, and the trustees did not concur in it. *Mrs. Morgan* has not signed it, who would naturally sign what *Mr. Morgan* presented to her as proper for her to sign. No man can, on this evidence, believe that this 1,200*l.* was received and handed over at the time.'

'For these short reasons, I am clearly of opinion, that the requisition of the House of Lords has been by no means complied with. The four first exceptions therefore should be allowed; but the other is perfectly unintelligible, and therefore must be disallowed.'

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With respect to such of the exceptions as were allowed, the Deputy Remembrancer was ordered to review his report; and it was ordered that he should compute interest on the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and that he should take an account of the rents and profits of the estates in mortgage and not in mortgage, received by the defendant,

defendant, for the trustees and mortgagees, and also an account of money received for timber cut down on the estates, which were to be carried on from the foot of the account mentioned in the report of the 2d July 1802, to the mortgage accounts, and the amount to be set off against what should be found to be due for principal and interest on the several mortgages.

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Against that order the defendant appealed to the House of Lords, contending, that it was departing from the general tenor of the suit, as instituted by the plaintiff for the relief prayed, and the decree thereon, and that whatever equity the plaintiff might have to found an application upon for redemption of his estate, it could only be on payment of the 12,000*l.* actually advanced on his account, all of which must be taken to have been advanced on the security of the term of 500 years,

The respondent (the plaintiff) contended, that he was entitled to redeem on paying what had been found due by the separate report on the mortgage account only, and that all *ultra* the amount was to go to over the general account, as being properly the subject-matter of the general report.

ELDON, *Lord Chancellor*, now delivered judgment. [Having adverted to his personal recollection of the facts of the case—the decree of this Court, whereby the separate report was ordered:—which he said was founded on a bill which prayed not only an investigation of the accounts said to have

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have been settled, but of all dealings and transactions between the parties; and therefore the object of that decree must have been to have required evidence to be given of the consideration of the bonds, or it would have been confined in its terms to the surcharging and falsifying particular accounts relating to particular securities. Then noticing former order of the House of Lords thereon.] That order (observed his Lordship) proceeded on the principle in the case of *Vaughan v. Lloyd* (which he recognized), that securities taken from a client by an attorney for money proposed to be advanced by the latter are not conclusive evidence, as in other cases, of the consideration having been actually paid; for, in all such cases, it is incumbent on the attorney to shew that he acted as much for the advantage of his client as of himself.

‘The original decree (said his Lordship) of the Court of Exchequer, as modified by the subsequent order of this House, is calculated to afford the respondent extraordinary relief, going beyond the common course, in cases of redemption of mortgaged property, to a general account of all dealings and transactions that may have at any time taken place between the parties. In the mean time there has been a separate report of the mere mortgage accounts ordered to be taken as distinct from the general account between them, which general account yet remains to be taken. That separate account must first be disposed of, that the mortgage accounts may be first cleared, which must have been the object of it, and then the general account may be taken, and what may be disallowed

disallowed the appellant in the separate report may still be allowed him on the general account. That may be the case with respect to the 2,400*l.*, which has been hitherto disallowed by the Deputy Remembrancer, acting under the order of this House, declaring that those securities were not to be taken as evidence of the consideration for them having been advanced, and as not being admissible as an item in the mortgage account, because not supported by other evidence; but, on the contrary, falsified by the accounts as far as they related to them. If, however, the money were actually advanced at any time, justice may yet be done to *Morgan* by the general report.'

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'Then *Morgan* has taken in execution on his judgments, timber felled on the mortgaged estates. The mortgagor himself has no right to cut timber, whereby he lessens the security, and commits trespass. Can *Morgan* then be allowed to take in execution for a debt due from the mortgagor, the timber which the mortgagor cannot enter to take, merely by the effect of any privilege arising from his situation as solicitor to both mortgagor and mortgagee? He certainly cannot. I am therefore of opinion that in that respect the order of the Court of Exchequer is substantially right, and with some alterations as to the exceptions, and further directions may be affirmed.'

'It was objected that the Court of Exchequer had given further directions on the hearing of the exceptions, which, it was contended, they had no right to do; but as the directions related wholly to the  
 the

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the separate report only, to which the exceptions were taken, I think there is nothing in that objection. There are no directions given as to the judgments, but they are not a necessary part of the present separate report.'

REDESDALE, *Lord*, (corroborating the Lord Chancellor's view of the grounds of the former decision of the House) put the present case on a footing of distinction from the common and simple one of mere mortgagor and mortgagee.

'This (said his Lordship) is the case of an attorney, who acts as general agent and legal adviser of his principal and client, obtaining his bond; he is therefore bound by a very strict rule of law to prove by other evidence the actual advance of the whole consideration. That principle was recognized in the case of *Vaughan v. Lloyd*. The actual mortgagees, however, have a right to have the 8,209*l.* accounted for to them, whether that money was applied by *Morgan* to the account of *Lewes* or not, which one of the exceptions implies a doubt about. They have nothing to do with that which is a matter between *Morgan* and *Lewes* altogether.'

'The want of accuracy in *Morgan's* books of accounts is not to be used in his favor. It is his business to keep regular accounts, and if he suffers any loss by not doing so, it is his own fault. That was so held in *Vaughan v. Lloyd*, in which I was of counsel, and I believe that *Lloyd* did suffer a loss in consequence; but it would be monstrous to allow a man to avail himself of that irregularity,

irregularity, so as to enable him on that account to charge another by his mere assertion.'

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'The argument founded on the accounts having been settled, cannot be of any avail in a case of this sort; and in point of fact, when they are submitted to investigation, they contradict themselves. The decree of the Court of Exchequer is right therefore in effect, although some few of the circumstances of the case may have been overlooked by the Court.'

'The produce of the timber account ought to go in discharge of the mortgage account. Morgan had no right to take it on account of his debts. As to the judgments, they were probably included in the separate account, to enable the mortgagees, if it had been necessary, to have availed themselves of them.'

'As to the objection of the Court of Exchequer having given further and other directions, or the hearing of the exceptions, as the whole related to this separate report, I think that they had a right to do so.'

ERSON, Lord Chancellor. 'I am desirous of stating that the proceedings on this record establish the principle, that in the case of an attorney who takes securities from his client, they cannot be used as conclusive evidence of their consideration as expressed, but require extrinsic evidence of the money having been actually advanced to prove the transaction to have been *bond fide*.'

*see Sug. Law of Prop. in York. It  
does not express the real nature  
of the transaction*

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It was therefore ordered,

As to the 1st exception.—That the said order of the 5th of *July* 1813, complained of, so far as thereby the first exception taken by the said respondent to the said report of the 25th of *June* 1811, was allowed, be affirmed as to so much of the said exception as excepts to the said report, for that the Deputy Remembrancer thereby certified, that he found that the sum of 500*l.* in the said exception mentioned, was advanced to the said respondent, as and for the consideration of the bond bearing date the 31st of *January* 1774, and that the same was paid into the proper hands of the said respondent, it appearing by the Master's report, that no evidence had been produced before him of the actual advance of the said 500*l.*, *as and for the consideration of that bond.*

And that the said order be reversed, so far as the rest of the said first exception was thereby allowed, and that the rest of the said exception be over-ruled, without prejudice to any question which might arise upon the matter thereof.

As to the 4th exception.—That the said order be affirmed, so far as thereby the fourth exception was allowed, with this addition, *that such allowance of such fourth exception* was to be without prejudice to any question which might arise in taking the general account between the said appellant and the said respondent, directed by the decree, whether the sum of 8,209*l.* 7*s.* 1*d.* in that exception mentioned, was ever, and when, and in what

what manner, advanced by the said appellant to or for the use of the said respondent.

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And that so much of the said order of the 5th of *July* 1813, as describes the two several sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, as the principal money that would appear after the revision of the said Deputy Remembrancer's said report, in respect to the said respondent's exceptions, be varied, by inserting in the said order instead of such description, after the words "*four thousand two hundred and nine pounds seven shillings and one penny, and four thousand pounds,*" the words "*which in consequence of the allowance of the said respondent's exceptions, would appear to be the principal money advanced to the said respondent, as and for the consideration of the mortgages for 6,610*l.* and 5,390*l.*, making together 12,000*l.* in the said report mentioned.*"

On the 11th of *May* following that order was made an order of the Court of Exchequer.

On the 17th of *July* following, the plaintiff applied to the said Court of Exchequer for re-possession of the estates, when the Court declared, that the order for a separate report to take an account of the mortgages and judgments was part of the decree, and could not vary therefrom, and that no variation could be made in the decree, but on a re-hearing; that the said order, as worded, had plunged the case into almost inextricable difficulties, that it was separating a matter in its nature inseparable, and that re-possession

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could not be ordered till after the general report, wherein an account of all dealings and transactions between the parties would appear.

On the 1st of *February* 1817, the Deputy Remembrancer made his fifth separate report.

Certifying as to the 1st exception, that no evidence had been produced before him of the actual advance of 500*l.* as the consideration of the bond, dated the 31st of *January* 1774 (part of the consideration for the bond of 2,400*l.*)

As to the 2d exception—that the consideration for the mortgage for 6,610*l.* proved before him, appeared to be 4,209*l.* 7*s.* 1*d.*, which was the only money received by the appellant *John Morgan*, as agent to the said *William Farrer* and *James Morgan*, in respect to that transaction.

As to the 3d exception—that the *aforesaid* 4,209*l.* 7*s.* 1*d.*, together with 4,000*l.*, received by the said appellant of the said *James Morgan*, on behalf of the said *Henry Wilder*, making together 8,209*l.* 7*s.* 1*d.*, constituted the total amount of the mortgage money received by the said appellant as agent to the said respondent and the mortgagees, in respect to the mortgage transactions.

As to the 4th exception—the order having affirmed the allowing of the fourth exception, with the addition that such allowance of such fourth exception was to be without prejudice to any question which might arise, in taking the general

neral account between the said appellant and the said respondent, directed by the decree of the 2d of July 1796, whether the sum of 8,209*l.* 7*s.* 1*d.* in the said exception mentioned, was ever, and when, and in what manner, advanced to or for the use of the said respondent; he therefore further certified, that he considered himself not at liberty in and *by that his separate report* to enquire into the disposition of the said 8,209*l.* 7*s.* 1*d.*, the same being referable *to the general account* between the said appellant and the said respondent.

And he further certified, that he had proceeded to compute interest on the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and to take the account of rents and profits, and monies received for timber from the foot of the account mentioned in his report of the 16th of July 1802, and had carried the monies so received to the mortgage account, and set the same off against the said principal and interest.

And that, on the 3d of September 1804, the monies so received exceeded the said principal sums, and interest thereon to that time, by 999*l.* 7*s.* 10*d.*; he had therefore not carried down the calculation of interest beyond the said 3d of September 1804, and found that since the said 3d of September 1804, and previous to the 6th of June 1810, beyond which latter period the said respondent had not brought down his charge, the said appellant had received, in respect of subsequent rents and profits, several sums, amounting, with the said 999*l.* 7*s.* 10*d.*, to 4,993*l.* 10*s.* 10½*d.*

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And he certified, that he had in the schedule annexed set forth an account of the interest allowed by him on the said principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and also an account of the particulars of the rents and profits, and of money received for timber (referring to an annexed schedule).

To that fifth report of the Deputy Remembrancer the defendant filed two exceptions*.

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The exceptions now came on to be argued, when the whole were over-ruled by the Court.

It

\* 1st. For that the Deputy Remembrancer had certified, that on the 3d of *September* 1804, the monies received by the defendant *John Morgan* for rent and profits, and timber, exceeded the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and interest thereon, to that time, by 999*l.* 7*s.* 10*d.*, and he had therefore not carried down the calculation of interest beyond the 3d day of *September* 1804, and that since the said 3d of *September*, and previous to the 6th of *June* 1810, beyond which latter period the plaintiff had not brought down his charge, the defendant had received in respect of subsequent rents and profits, money amounting, together with the 999*l.* 7*s.* 10*d.*, to 4,993*l.* 10*s.* 10½*d.*

Whereas the Deputy Remembrancer ought not to have so certified, he not having been directed or warranted to make such stop in the computation of interest, nor in the account of rents and profits, and money received for timber, but ought to have carried on the computation of interest, and the accounts of rents and profits, and money received for timber, down to the time of making his said report, and then to have set off the amount of principal and interest against the amount of the monies received for rents and profits, and timber, and ought to have certified as the fact was and is; and although the plaintiff had not brought down his charge of rents and profits received beyond the 6th day of *June* 1810, yet that the defendant had brought in the accounts of monies received for rents down to *December* 1816, whereby the Deputy Remembrancer was enabled to bring down such accounts to that time,  
 and

It was then moved on the part of the plaintiff, that the defendants *Francis, James, and John*

*Morgan,*

and the Deputy Remembrancer ought to have carried down such account accordingly.

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2d. For that the Deputy Remembrancer had certified, that he had, in the second schedule annexed, set forth an account of the interest allowed by him on the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and also an account of the particulars of the rents and profits, and timber, money received as aforesaid.

Whereas the Deputy Remembrancer ought not to have so certified, nor to have annexed such schedule, but he ought to have carried on the calculation of and allowed on the sums 4,209*l.* 7*s.* 1*d.* and 4,000*l.* down to the time of making his report, and the schedule to such report ought to have contained an account or calculation of such interest, and of such rents and profits accordingly.

And the plaintiff took the following single exception :

For that the Deputy Remembrancer had certified, that he had proceeded to compute interest on the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and to take the account of rents and profits, and of monies received for timber from the foot of the account mentioned in his former report of the 10th of July 1802, and had carried the monies received for such rents and profits, and timber (all which he found to have been received by the defendant), to the mortgage account, and set the same off against the principal and interest; and that he found, that upon the 3d day of September 1804, the monies so received exceeded the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and all interest thereon, to that time, by 999*l.* 7*s.* 10*d.*, and since the 3d day of September 1804, and previous to the 8th of June 1810, beyond which latter period the plaintiff had not brought down his charge, the defendant had received in respect of subsequent rents and profits, money, together with the 999*l.* 7*s.* 10*d.*, to 4,993*l.* 10*s.* 10*d.*

Whereas the Deputy Remembrancer, on taking the account, had omitted to make rests, when the rents and profits received exceeded the interest, and had calculated such interest at 5*l.* instead of 4*l.* per cent., and had allowed to the defendant sums of money for repairs, rates, and taxes.

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*Morgan*, might be restrained from receiving the rents and profits of the estates and premises in mortgage and not in mortgage. And that the said defendants and *George Morgan*, might deliver up to the plaintiff, the possession of the several estates and premises, and the title-deeds and writings relating thereto. And that the sum of 4,993*l.* 10*s.* 10*d.* by the report of the Deputy Remembrancer, reported to have been received by the defendant *John Morgan*, in respect of the rents and profits up to and subsequent to the 3d of *September* 1804, over and above the two principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.* and interest, might be paid to the plaintiff without prejudice to any other matter in question in the cause.

*Dauncey* and *Raithby* contended, that so very important a motion, which went in effect to decide the merits of the cause at once, could not be entertained in this stage of the proceeding, nor until the general report should have come in, when alone the true state of the accounts, as in fact subsisting between the parties, could be known, and they went at great length into the circumstances of the case, and dwelt much on the existence of the outstanding judgments.

*Agar* and *Blake* submitted, in substance, that as it was the manifest intention of this Court, and of the House of Lords, by ordering a separate report to be made as to the mortgages, to exonerate the estates as soon as the mortgage debts were discharged, the time was now come when the plaintiff having been shewn to have paid off those debts,

debts, might demand possession of his estates from the defendant, who could have no further right to withhold them from him, whatever might be the state of the general account,

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The Court then delivered their several opinions 18th November.  
 as follows:—

GRAHAM, *Baron*.—‘The present motion consists of two parts,—that the defendant may be restrained from receiving any further rents and profits of the estates of the plaintiff, as well those in mortgage as not in mortgage: and that the defendant may be ordered to deliver up possession of the estates, and to pay to the plaintiff the sum of 4,993*l.* 10*s.* 10½*d.*’

‘And this application is made in consequence of a fifth report of the Deputy Remembrancer, after frequent exceptions taken to his former reports in this Court, and two appeals thereon to the House of Lords, in which last the House state definitively, that the sums to which the consideration of the Deputy Remembrancer was to be solely directed, were such as had been actually advanced by the mortgagees, on the mortgages, and they were ultimately reduced to the amount actually received by the defendant, in cash, as agent for the plaintiff, from the original mortgagees. The Deputy Remembrancer finds, that that sum was 8,209*l.* 7*s.* 1*d.* the disposition of which by the defendant is referred to the general account. He then finds, that the defendant had at the time down to which the plaintiff had brought down his charge (*June*

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1810) received for timber, and by rents and profits of the estates from 1803 to 1807, 4,993*l.* 10*s.* 10 $\frac{1}{4}$ *d.* more than the principal money actually advanced as the consideration for the mortgages, and all the interest thereon, down to *September 1804, when he finds, that the mortgage money was all paid off.* That sum therefore is a balance in favor of *Sir Watkin Lewes*, on that account, now in the hands of *Morgan*. He himself alone can claim no right against the estates, independently of that of the mortgagees whose agent he was, and a balance being once found in his hands, the pledge which he holds must be delivered up.'

'Many arguments have been used, founded on the peculiar circumstances of this case which arises on a bill filed so long ago as the year 1783, by which it has been endeavoured to be shewn, that the defendant is the injured person.'

[Here his Lordship adverted to the leading facts of the case, and noticed the result of the different reports ultimately finding that the 12,000*l.* originally found to have been money advanced on the mortgages, ought to be cut down on going into proof of the items to 8,209*l.* 7*s.* 1*d.* the surplus having been peremptorily disallowed by the House of Lords, as a pretext, tending to work the injustice of holding the estates chargeable for monies advanced or due, if advanced or due at all, on the plaintiff's personal responsibility.]

'I also adopted the same view, and therefore we referred

referred it back to the Deputy Remembrancer, and when it came again before the House of Lords, they said we do not direct any inquiry into the particulars of the monies advanced, other than as to those on mortgage, or of the sums constituting the bond debt of 2,400*l.* for those latter sums must not be allowed to be made a charge upon the estate; but must go over to the general account. Now, it is a most singular argument to use, that the House must be understood by that decision to mean, that though the defendant can have no claim on the estate, for the money composing that particular sum, if not advanced *bonâ fide*, on the mortgage; yet he shall be put in a still better situation, in consequence of his having been guilty of a legal fraud in so mixing the sums together, and shall be allowed to charge the estate with the whole of his claim. It would be trifling with the judgment of the House of Lords so to construe it. The necessary consequence is, that with respect to those sums they must not be considered as forming any part of the enquiry on the separate report, but must go over to the general account, and if that or any part of it be due to the defendant, he may still be a creditor as *ab initio*; but it must not be made a charge on the mortgaged estates.'

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'Another argument was, that we cannot take the estates from the defendant, because he is in possession under his judgments, which it has been contended were tackable to the mortgages by virtue of his possession; but that is not true. He is, in truth,

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truth, in possession, in the character of receiver under the deed. Then it is said, that as it is a mere term, he is entitled to keep possession on the ground of his general lien. But it would be absurd to hold, that a formal fiction adopted in conveyancing for technical purposes, should be so construed as to work such an injustice. The term was enacted for a particular purpose, and after his receivership should be at an end, there would also be an end of his term. It is untelligible how he got into possession; but being in he could not enforce his *elegit* against his own possession. As soon as the mortgages are discharged, his receivership is gone. The argument of his having been appointed receiver by this Court is, if possible, more meagre still. The pressure of distress compelled Sir *Watkin* to submit to that appointment, and when the last receiver broke and run away, *Morgan* availed himself of the occasion, to enter again into the receipt of the rents and profits in which he has continued ever since.

‘If the judgment for 1,142*l.* be investigated, how was it obtained? It was founded on the alleged balance of accounts. But that account has been broken up; and how that settled account, as it has been called, could have blinded any man of common sense for a moment, is perfectly astonishing. That settlement was also one of the advantages which were taken of the plaintiff’s distress. As to the *elegit* set up, it is quite absurd; for *Morgan* was himself in possession at that time as receiver.’

‘It

'It was at one time pretended, that the monies advanced from time to time, for which the bond of 2,400*l.* was ultimately given, was the proper money of *Chardin Morgan*; but the House of Lords repelled that attempt to mislead them with indignation; and they said, that that sum should be carried to the general account, if there had been any thing really advanced. At another time it was contended, that the judgments were tackable to the mortgages; but that could not be, because they were obtained in a different character from that of mortgages. The defendant was in possession as agent to the trustees merely, and they had nothing to do with the judgments. Had they indeed been obtained in the same character, there might have been something in it, but in this case that was clearly not so.'

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'On the fact of the mortgage to Dr. *Kent* having been paid off, the defendant founds this extraordinary argument. If you cut down the mortgage debt of my trustees, they will have paid so much less on that account, than I should otherwise have received, and I having paid off Dr. *Kent's* mortgage, and expended the remainder in payments, did it with my own money, and therefore, I am entitled to stand in the situation of *Kent*, and become by that payment a mortgagee for the 5,000*l.* so paid to him. But the fact is, and it appears even by that very account wherein the payment of that mortgage is made one of the principal items, that the defendant had at that time abundant money of the plaintiff's in his hands,  
 with

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with which he might have paid it; and really this attempt at imposition is altogether the most candid I ever heard of. By that account (and it is curious enough that he states it during the years 1775 and 1776) it appears, that after the payment of the 5,000*l.* to Dr. *Kent*, the defendant had actually in his own pocket much more than that sum of the plaintiff's money; but then he adroitly discharges himself of the rest by business done; but business at that time in embryo I believe. And are we to permit a man to make himself a mortgagee by availing himself of such a shuffle?'

'Then the final settlement of the accounts is the only argument that remains; but that has been answered again and again, by the fact of the peculiar circumstances in which these parties were situated. That therefore amounts to nothing.'

'There was indeed another argument founded on the representation, that there were large sums of money due to the defendant, on advances not charged on the estate, which during all this time he has been unable to make available; but *Morgan* had no charge *ultra* the money of his trustees, that could give him a right as against the estate, for there was no *elegit* executed, and therefore he could have no lien. That therefore can only be applicable to that part of the motion, which requires the defendant to pay over the money in his hands to the plaintiff. But surely the defendant has no right to complain of his hands being tied up, for to whom, but himself, has this unexampled litigation

gation been owing, and that founded on a fictitious claim, which has been reduced in the ultimate result of various enquiries in a proportion of nearly one half of its present amount. If therefore he has suffered, it is his own fault; but let it be also observed on the other hand, that from 1775 Sir *Watkin Lewes* has not during so many years touched a shilling of the rents and profits arising from these valuable estates.'

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'*Ex debito Justitiæ*, the Court would have done right in granting this application long ago; but they have been prevented by points of form. The consequence is, that *Morgan* has been receiving interest for so long a series of years on the whole of his claim, as if the whole had been in point of fact due on the mortgages, whereas it has been in the end reduced in the way I have stated, and there is a balance actually found to be at this moment in his hands. Is he then the person entitled to complain? Sir *Watkin Lewes*, indeed, on the contrary, might well complain of the effects of these proceedings.'

'But giving him credit for the advances which he says he has made, they would make but a poor figure, if the usual rests were allowed.'

'The only part of the motion about which I entertain any doubt is, that which requires the money to be paid to the plaintiff. I could almost be bold enough to say, that it ought to be granted; but on that point I shall defer to the opinion

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nion of my brothers. I am however quite clear in the opinion, that the mortgaged estates ought to be delivered up. For that there needs no precedent, it is matter of pure justice, and I would take it on my own responsibility to make the order. I would also extend it to the estates not in mortgage, for the mortgage accounts having been sifted to the bottom, it appears that the defendant has been paid over and over again. I think, however, that the 4,993*l.* 10*s.* 10*d.* if not ordered to be paid to the plaintiff, ought to be brought into Court. Thus there may be some prospect of ending this protracted cause, and of relieving the Court.'

Wood, *Baron*. 'I am also for concluding this cause; but I cannot concur in granting this application as to either part, because, if we should do so before the whole case is fairly brought before us, we should be doing very great injustice to *Morgan*. There were two accounts directed to be taken; one as between Sir *Watkin Lewis* the mortgagor, and the mortgagees; the other, as between him and *Morgan* generally. One of those accounts has been taken, and it has been found by the Deputy Remembrancer's report, that the mortgages to *Morgan's* trustees, and to *Wilder*, have been satisfied. But the other account still remains to be taken, and we ought not, I think, to grant this application until that shall have been done; for, whenever the Deputy Remembrancer's general report shall be made, I am convinced that there will be found to be considerable sums of money due to the defendant.'

'Much

'Much obloquy has been thrown on *Morgan*, but I think that this motion is much more deserving of reprehension; for it is an attempt to take out of his hands the only security which he has for very large sums, which I pledge myself to shew to be due to him.'

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'This must not be taken as if it were a mere insulated case as between mortgagor and mortgagee, but with a general view to the whole of the dealings between the plaintiff and the defendant. It appears, that money was borrowed by the former of the latter from time to time, till it amounted to 2,400*l*. That, it is said, must be the subject of the general account. It is however quite clear on the evidence on which the report proceeded, that that was the sum advanced, or within a trifle. The other money said to have been advanced by the trustees, has been struck out certainly, not as not being due, but only as not being due on the mortgage account, and therefore it has been referred to the general account. It seems that Sir *Watkin Lewes*, being distressed for money, gets 8,000*l*. from *Morgan*, who includes in the advance the bond for 2,400*l*. (His Lordship then stated the circumstances of the manner in which the 8,000*l*. was made up.) *Morgan* gave him accountable receipts for the whole sum. 4,000*l*. more was afterwards borrowed of *Wilder*, for which also *Morgan* gave his accountable receipt. All such money Sir *Watkin* secures to the lender on his settled estates by a term of years, as he had power under his marriage settlement to do. Then has that 12,000*l*. been

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been applied to Sir *Watkin's* use by *Morgan*? Sir *Watkin* has admitted it, and that a balance was due to *Morgan* on the settlement of accounts in his own hand-writing; and he was certainly not that credulous and ignorant man to submit to imposition. He was a barrister, an alderman of the City of *London*; and has been in parliament. Would such a person have settled an account, and have given a note for the balance, unless he was conscious that it was all correct, and that he really owed such balance? By that account the defendant makes himself debtor for 13,000*l.* from which he discharges himself by accounts of money paid to the plaintiff and to other persons on his behalf, as *per* receipts, which vouchers on that settlement of the accounts were all delivered up. That account is signed. One of the items is the payment of Dr. *Kent's* mortgage, for 5,000*l.*; and that was expressly one of the objects to which the money to be raised by the creation of the term of five hundred years, was to have been applied. Now, it is alone a sufficient objection to the present motion, that the effect of it would be to deprive the defendant of his equitable right to stand in the place of the mortgagee, on his paying off the mortgage debt; for that will be the consequence of our obliging him to give up the possession of the estates.'

'In the whole of the settled accounts there were only three or four small bills for business done objected to (and those in part only) by the plaintiff. All the other items he has ticked off as being satisfied of their accuracy; and having made

some

some small deductions from the bills in his own hand-writing, he signs the accounts. It is quite clear therefore, that *Morgan* has accounted for every farthing of the money advanced to him for Sir *Watkin Lewes* on the mortgages; but beyond that, he has further demands which are waiting the result of the general report. Where then has Sir *Watkin* been imposed on? That the payments charged against him by *Morgan*, as made by him on behalf of Sir *Watkin*, were made, is actually self-evident, and so the Deputy Remembrancer has reported. [His Lordship then adverted to the various proceedings in this cause, and particularly as to the several reports (noticing that the defendant, in consequence of having acted as the attorney for the plaintiff, was not permitted to prove that the consideration money for the bonds had been advanced by him, by the mere production of the securities alone) and having commented on the object and effect of the several orders made from time to time by the Court,] he continued, 'On the separate mortgage account, the money found to have been actually advanced by the trustees to the mortgagor, had been reduced to the sum of 4,209*l.* 7*s.* 1*d.*, and the Court directed that the Deputy Remembrancer should compute interest on that sum, and on the 4,000*l.* advanced on mortgage by *Wilder*; and that he should take an account of the rents and profits of the estates in mortgage and not in mortgage, received by the defendant, or the mortgagees; and also of money received by them for timber cut down on the estates, and that such money so received should be set

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off against the principal and interest of the mortgage money. In that way nothing was to be allowed to the defendant, on account of his disbursements, as having made himself accountable by his receipts for money advanced to him as agent of Sir *Watkin*, on mortgage of Sir *Watkin's* estates. The money, however, has been in fact advanced by *Morgan*, according to the tenor of his accountable receipts; yet the sums (as reduced by the last separate report of the Deputy Remembrancer) found to have been actually advanced on the mortgages, were paid off in *September 1804*; and therefore it is that this application is now made to the Court. The consequence is, that on the coming in of the general report, there will be found to be a debt due from the plaintiff to the defendant, of more than 8,000*l.* for which, if this motion is granted, he will have no sort of security, except the personal responsibility of Sir *Watkin Lewes*, which, as he has only a life interest in the estates, cannot be considered as worth much at his time of life. Therefore I cannot but think, that to compel the defendant to give up the only security which he has in his hands, on the faith of which he parted with his money, is much too strong a measure, without first having before us the general report, which alone can enable us to know how the accounts stand between them. As to the payment into Court, of the sum of 4,993*l.* that will be no sort of adequate security, for, as I have already stated, there will be a much larger debt found to be due to *Morgan*. Take the 2,400*l.* and 1,390*l.* only, and forty years interest, it is clear to demonstration, that

that there is more than 10,000*l.* now due from Sir *Watkin Lewes* to *Morgan*, and it would be a manifest injustice to deprive him of his securities on the present motion. Had the House of Lords said, that the estates should be given up on payment of the money due to *Morgan*, it would have been a different matter. But it does not follow that because the House of Lords have directed that an account should be taken of the money received by the defendant, or the mortgagees, and that the amount should be set off against the principal and interest due on the mortgages, they have therefore ordered that on the payment of such principal and interest, the estates should be delivered up. And I cannot draw any such inference, even from their Lordships' judgment, as I understand it to have been delivered on the appeal.'

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'Then, if in point of fact there shall ultimately be found to be a considerable sum due from Sir *Watkin Lewes* to *John Morgan*, on the general account directed to be taken, the House of Lords have not declared that he shall not avail himself of the security which he now holds for securing to himself the payments of the amount. The House expressly profess to proceed upon the principle of the case of *Vaughan v. Lloyd*(a). I think that case was properly decided; but the attorney there, notwithstanding his demand was reduced, was not deprived of his security. The estates were not discharged from their liability.'

(a) 6 Ves. 48.

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‘Why also should not these estates continue to be security for the general balance of the accounts. There is, in fact, a mortgage for the 2,400*l.* existing against the estates still; and what law is there, or what principle of justice or equity that operates to prevent an attorney from taking a mortgage for securing to himself any demand which he may have against his client? There is no case, as yet, decided in a Court of Equity, authorizing such a proceeding as this. The case of *Vaughan* and *Lloyd*, as far as it is in point, is an authority the other way.’

‘Then let the estates be delivered up, but let them be charged with securing what may be found due to the defendant on the general report; and we cannot but see by the papers already before us, that there will necessarily be found to be a considerable sum of money due to him, and we should be doing him a manifest and irreparable injury by depriving him of his only security.’

GARROW, *Baron*. ‘I feel myself, on the present occasion, in the most painful situation in which a judge can be placed, in being called upon to deliver my opinion, on a case wherein my learned brothers are not agreed, and that, on an application made to the Court, soon after my taking a seat on the bench—a case which has for its object the expediting a suit that has been so long delayed by litigation as to have become reproachful to the administration of justice, and an opprobrium to this Court. It is one on which we ought to sit
day

day by day, till we have rid ourselves of it, by conclusively determining all the questions between the parties.' [His Lordship having descanted with much force and feeling on the situation to which the plaintiff, who had set out in life with the fairest prospects, had been reduced by the consequences of this cause, which had (besides the pecuniary embarrassments resulting to him from it more immediately) thrust him from the honorable situation which he once held in society.] 'It has been argued (continued his Lordship) and with very considerable ability, against the opinion I hold; and we are told at the bar that what we are about to do will be an act of injustice. However painful my duty is rendered therefore, it is matter of great relief to find myself concurring with a judge of the high character and attainments of the learned Baron, who first delivered his opinion.' [His Lordship having pronounced a high eulogium on the talents and integrity of Mr. Baron *Graham*, added, that he never heard a judgment delivered, which contributed so much to his entire satisfaction, or which excited so completely his unmingled approbation.]

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'I concur entirely (continued his Lordship) with that learned judge in the opinion, that the estates ought to be delivered up, and if there could be any doubt about the opinion given by him also on the latter part of the application, it is, that it does not go far enough. I think that the money ought to be paid over at once to the plaintiff, that it might thus become a fund which may here-

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after be applied in procuring for himself redress and justice, and may no longer be the means of perverting the due course of right between the parties. Perhaps, however, it will be best to adopt, as more moderate, the middle course suggested by my Brother *Graham*, that the money be ordered to be brought into Court, to await the final event of this cause.'

' This is not, as has been suggested at the bar, a case resting on the capacity or incapacity of the plaintiff, to take care of his own personal interests. My opinion proceeds on the defendant's own shewing, as to the conduct which he has pursued, which is, as it has been called with admirable felicity, an effort at the most candid imposition. It is the case of a man distressed by the effects of an election contest, applying to a solicitor, who uses that opportunity of getting him completely into his power. [His Lordship then adverted to such of the circumstances, already detailed, as apply to this part of the case.] ' This cause presents the extraordinary spectacle of an estate, which has itself paid off the mortgage on it, leaving a balance still in the hands of the man who has been appointed receiver of the rents and profits; and of which he yet keeps possession, under pretence of other debts due to *him*! If this were a common case between mortgagor and mortgagee, there could be very little doubt about it; but the peculiar situation of these parties, and the connection which subsisted between them, puts it out of all question.' [His Lordship then

then took a cursory view of some of the main facts—the reports—and the judgments of the House of Lords, from all of which he drew the inference, that the chief object of the present protracted enquiry had been, to ascertain how far the *estates* were affected by the transactions, in order that as soon as they should be found to be disencumbered, possession might be restored to the plaintiff.] And he concluded by saying, ‘Our opinions will most probably be reviewed elsewhere, and I am desirous that mine should be fully canvassed. Justice must ultimately be done. And I trust, that the result of this cause will be a lesson, teaching attornies, that where their conduct has been such as to require investigation, Courts of Equity are open to the client of whose situation they have taken advantage; and that persons, in the predicament of the plaintiff, should be more cautious how they deliver themselves up to their legal advisers without the intervention of a third person, whose interposition might protect them from the evil consequences of misapplied confidence.’

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Ordered—That the possession of the estates should be delivered up, and the money to be paid into Court, to abide the event of the suit.

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25th November.

BAX v. JONES, Esq. and others*.

In the notice required to be given to persons within the 24 Geo. II. c. 44, of actions intended to be brought against them, it is not necessary to name all the parties meant to be included in the action, or to express whether the action is intended to be joint or several.

THIS was an action of trespass brought by an individual against the defendants, who were a magistrate of the city and county of *Canterbury*, and certain constables, for an assault and false imprisonment.

The cause came on to be tried at the last summer assizes for the county of *Kent*, before Lord *Ellenborough*, where the same objection was taken to the form of the notice given to the defendants, as required by the statute, as was made in the case of *Agar v. Morgan* and others (a), and on that point his Lordship nonsuited the plaintiff.

Cause being now shewn against a rule obtained for setting that nonsuit aside, and granting a new trial, the case above alluded to was cited and much discussed on both sides.

RICHARDS, *Chief Baron*. I am not aware that the Court requires in its construction of the statute, that the parties against whom an action of this sort is brought, should have a more particular notice† than has been given them on the present occasion,

* This case is reported here, because it gave rise to a review by the Court of a former opinion delivered on the same point, which it in all respects confirmed.

† That notice was also addressed to and served on *each* of the parties, and was thus worded:—You having, &c. I as agent, &c. give you notice according, &c. that I shall, at the expiration, &c. cause a writ, &c. to be issued, &c.

(a) *Ante*, vol. ii. p. 126.

occasion, and if it be not required by the statute, we ought not to insist on it. The case which has been cited was one which underwent much discussion, and was well considered by this Court, as it was at that time constituted, and therefore I am clearly of opinion, that this rule must be made absolute.

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GRAHAM, *Baron*, I am of the same opinion, and I ground myself implicitly, on the case cited.

WOOD, *Baron*, concurred.

GARROW, *Baron*, of the same opinion.—I think the case which has been cited is binding on the Court. I remember also a similar objection so disposed of in a case in the *King's Bench*, of *Ferguson v. Sir William Addington*. The former decision of this Court in the case of *Agar v. Morgan*, seems to be so founded in good sense, that were this question one of first impression, I should have thought that it must have come to the same result.

Per curiam.

Rule absolute,
With Costs.

WARING

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Tuesday,
25th November.

In proceeding against bail on the return of *ex. sa.* in this Court, by *subpæna*, the bail have only four days after the return of the writ, in which to render their principal.

Where the writ was returnable on the last day of term, and the bail had been unable to render the defendant, from the dangerous state of his health, within the four days, the Court refused on their application, after the expiration of the four days, to allow them to render the principal on that ground, in consideration of the shortness of the time allowed by that particular mode of proceeding, as abridging the usual time allowed in the other Courts, and even in this Court, by its ordinary process of *quo minus*.

Quere, if the application had been made before the expiration of the four days notice.

WARING v. JERVIS.

COMYN had obtained a rule nisi, for staying proceedings on the bail bond in this cause, on payment of costs, the defendant having surrendered.

Jones, D. F. and *Manning*, shewed cause on the facts stated in the affidavits filed in support of the motion, which were as follows:—That the bail entered into the recognizance on the 28th of *January*; that they were served with the *subpæna* on the 23d *June*, which was returnable on the 25th; that the defendant, for two months previous, and subsequent to that day, until the 1st of *August*, had been in so ill a state of health, that he could not have travelled to *London*, for the purpose of rendering himself, without endangering his life; and that as soon as he was able to travel he came to *London*, where, in consequence of the journey, he was confined to his bed for several weeks; that as soon as he was able to leave his bed, he was surrendered to the *Fleet* in discharge of his bail, which was on the 21st of *October*:

Jones and *Manning* contended, that the motion could not be granted consistently with the practice of the Courts, which has been long recognized in such cases, and strictly adhered to; and he cited the cases of *Rawlinson v. Gunston* (a), *Wynn v. Petty* (b); and *Winstanley v. Gait-*

(a) 6 T. R. 284.

(b) 4 East, 102.

skill,

stell(c), in the last of which the Court recognized the distinctions between an excuse arising out of a moral and out of a legal impossibility, and said, that in the former case the rule, though a strict one, proceeded on reasons of sound policy; and as to the rule of four days only being allowed the bail to surrender the principal in cases of proceeding by *subpœna* in this Court, they cited the case of *Rolfe and Another v. Cheetham* (d), and they submitted, that on the expiration of the four days, the bail having become fixed, it was too late to make such an application as the present to the Court, on the ground of the hardship of the case.

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 JESVIA,

Comyn, in support of the rule, relied on the case of *Mannin v. Partridge* (e), where the Court of *King's Bench* held, that a bankrupt principal having obtained his certificate after the return of the *capias ad satisfaciendum*, but before the time allowed the bail by the indulgence of the Court for rendering the principal had expired, entitled the bail to be relieved. He submitted, that as in strictness the bail were fixed on the return of the *capias ad satisfaciendum*, and as the whole of the present practice of allowing the bail a given time after the return of the process against them, emanated entirely from indulgence to the bail, the Court might extend it as matter of favour as far as, under any circumstances, they might think fit and reasonable; the argument therefore of the bail having been fixed, was not an answer to an

(c) 16 East, 389.

(e) 14 East, 599.

(d) Wightw. 79.

application

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application made wholly to the indulgence of the Court:—And it could only be on that principle, that the Court allowed the circumstance of the principal being incapable, from ill health, of being brought up out of custody to be rendered, to operate in discharge of the bail.

He then adverted to the *nature* of the proceeding by *subpœna*, which he submitted was a process, the disobedience of which brought the party into contempt, and therefore he observed it was a case more particularly within the clemency of the Court, who might permit the contempt to be purged; and he pressed the consideration of the strictness of the proceeding as contrary to the spirit of convenience and accommodation, on which the *original practice* of requiring the bail to render their principal before the return of the *ca. sa.* had been relaxed, as contrary to the practice of the other Courts, and even of this Court, in the common case of proceeding by means of its ordinary process of *quo minus*.

The Court (enquiring why the application had not been made before, and being informed that as the *subpœna* had been served only two days before the expiration of the term, the motion could not have been made before) said, that the bail should have applied before the return of the *capias ad satisfaciendum*, which they might have done, and they must have been aware that the time allowed for the render would expire before the motion could be made in term, if they waited till the service

vice of process; for that it was the duty of the bail to watch the proceedings against their principal, if they would protect themselves from the consequences of their engagement.—Therefore they

Discharged the rule; but
Without Costs.

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The KING v. BURN.

Wednesday,
26th November.
11th November.

HULLOCK, Serjt. moved for a rule to shew cause why the verdict—which had been found for the crown in this case, on the trial of an issue joined on a traverse to an extent against *Bruce and Co.* which alledged that *Burn was indebted to them in the amount of a certain bill of exchange* seized under the extent—should not be entered for the defendant; or why there should not be a new trial on the ground of that verdict being against evidence and law.

Where a bill of exchange—which had been returned by the holder, indorsed by him generally (who had received it from the payee endorsed by him also generally) to the drawers, with other bills and money in consideration of another draft for the whole amount, and which bill was then remitted by them (the drawers) to a bill-broker, under cover in a letter addressed to one of the firm of a banking-house,

(who were the drawers, but who had not accepted) accompanied with orders to the broker by the same letter to get the bill discounted, and to pay over the proceeds to the banking-house;—had been seized by a sheriff in possession of the banking-house, &c. under an extent, whose officers received it from the postman, at the time of the arrival of the letter in which it was inclosed.—*Quere.* Whether under such circumstances the banking-house had such a property absolute or qualified in the bill as would support an issue, that such second indorser was indebted to the banking-house in the amount of the bill?

Note.—The Court granted a new trial on an objection taken to a verdict (specially found for the crown, under such circumstances, that the facts did not support the affirmative of such an issue, expressing themselves desirous of having before them a fuller state of facts, but giving no opinion on the point of law.

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sue on such bill on its coming to his hands by an accident in the first instance; and whether a bill of exchange returned by a second indorsee, indorsed by him generally into the hands of the drawer for a new distinct consideration before it became payable, might be re-issued by the drawer so as to make such indorsee liable on his indorsement to a holder *with knowledge of the circumstances*.

The bill in question (which was for 400*l.* and dated on the 1st *July*) had been drawn by *Cooke and Co.* bankers at *Sunderland*, on *Bruce and Co.* bankers in *London*, (but had not been accepted by them,) payable at forty days in favour of *Herring*, and by him it was indorsed generally to the defendant *Burn* in satisfaction of a debt, and by *Burn* to *Cooke and Co.* in exchange for a draft for 1,080*l.* the amount of that bill and others.

It was in evidence that *Cooke and Co.* instead of cancelling the bill (as it was submitted they ought to have done) remitted it on the 1st of *July* (but not indorsed by them) to the house of *Bruce and Co.* their bankers in *London*—that it was the custom of their house so to remit bills, for the purpose of being written off—but that *this bill* had not been remitted direct in the usual manner, but sent under cover to *Alexander*, a bill broker in the city, through the medium of *Simpson*, one of the partners in the house of *Bruce and Co.* who was in parliament (in order to save the postage), for the purpose of being discounted by the agency of *Alexander*, who was directed by the letter in-

closed

closed to *Simpson*, and addressed to him (*Alexander*), which *was not sealed*, to pay the proceeds, as soon as the bill should be discounted, to *Bruce and Co.* on account of *Cooke and Co.*—At that time the sheriff was in possession of the shop and all the property of *Bruce and Co.* under an extent against them, and on the arrival of the parcel containing the letter and bill the sheriff's officer opened it and detained the enclosure.

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On these facts it was contended that the issue on the record was not sustained by the crown—that the defendant *Burn* was indebted to *Bruce and Co.* on that bill of exchange—because it had never come regularly into their hands, and was not therefore legally their property: and therefore that under these circumstances the bill could not be recovered on by any of the parties against *Burn*; for that the bill by being returned to the original drawer, under such circumstances, became extinct and *functus officio*, and could not be re-issued by the drawer so as to affect the party who had endorsed it to him, either while in the hands of the drawer or of third persons who had knowledge of the circumstances.

It was submitted, that if the letter, instead of being sent through *Simpson*, had been addressed directly to *Alexander, Bruce and Co.* would have had no right to the bill, or any legal means whereby they might have got it from *Alexander*—that if *Bruce and Co.* had not at that time failed, and had, on the receipt of the letter, taken out the bill, they could certainly not have sued the defendant

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defendant on it, or have made use of it in any way, and trover might have been maintained against them for the recovery of it—and that if *Cooke and Co.* had thought proper to counter-order the payment of the proceeds to *Bruce and Co.* at any time before they were paid over, they might have done so.

[It was suggested by the Court, that if *Bruce and Co.* had been the holders of the bill they might have sued on it, and that, while the order to pay the proceeds to them was in force, *Alexander* would be a holder for the use of *Bruce and Co.*]

But *quâcunq. viâ datâ Bruce and Co.* could have no property in the bill; for the utmost they would be entitled to by the order of *Cooke and Co.* would be to sue *Alexander* for money had and received *as soon as he should have got the bill discounted* if the proceeds were not then paid over to them.

He cited the case of *Beck v. Robley(a)*, wherein it was held, that a bill coming back to the drawer ceased to be a bill, and that the drawer could not maintain an action on it as indorsee—otherwise, as Lord *Mansfield* said, “the payee, having endorsed it, would also be liable to the drawer for which there is no colour.”—Now, if *Burn* was liable on this re-issued bill, *Herring* would also necessarily be liable, which the case decides cannot be permitted.

(a) H. Bl. 89, in notis.

It was insisted therefore that no action could be maintained against the defendant *Burn* under any circumstances on this bill by these parties, for it was not the case of a bill getting into the hands of a holder for valuable consideration without notice.—Here too *Bruce and Co.* were privy to all the facts, and particularly knew that the bill came from *Cooke and Co. the drawers*, and that it had been indorsed by *Burn* to them.—If *Bruce and Co.* had brought an action on the bill they must have shewn that they became possessed of it for valuable consideration, and without knowledge of the particular circumstances attending its negotiation, and they must therefore have been nonsuited on this bill, because they could not have done so. He submitted therefore that the verdict which had been obtained was not supported, and must be set aside. The Court having granted the rule.

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RICHARDS, *Chief Baron*, now read his report: from which, besides the circumstances stated to the Court on moving for the rule, it appeared that the bill was sent from *Sunderland* on the 2d of *July*, and arrived in *London* in due course of post on the 4th, on which day the bank of *Cooke and Co.* stopped payment—that the bill in question, which had been paid back to *Cooke and Co.* by *Burn* with other bills, had been passed by them in their books to *Burn's account*, and they gave him another bill for 1,080*l.* being the amount of all the bills paid in with the bill in question. That bill was not paid because the bank of *Cooke and*

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Co. had in the mean time stopped payment—*Burn* was at the same time indebted to *Cooke and Co.* to a larger amount than that sum.—The jury were of opinion (which they stated specially) that all the money arising from the discount was to have been paid to *Bruce and Co.* and *therefore* they found a verdict for the crown.

The *Attorney-General*, *Dauncey*, and *Nolan* now shewed cause. They submitted that one of the questions which had been left to the jury was, whether the money to be obtained by the discounting of the bill was intended by *Cooke and Co.* to be paid to *Bruce and Co.*, and they had found that the bill was not sent up for the acceptance of *Bruce and Co.* in order to be of greater value in the hands of the holder, but *as a remittance* whenever it should be made productive, either by being discounted, or by being paid by any of the parties liable on it, in discharge of the debt of *Cooke and Co.* to them as far as it would go, and it might therefore be considered as if it had been drawn on and was to be accepted by any other person. It was proved to be the course of dealing between the houses, that *Cooke and Co.* were in the habit of sending up bills to *Bruce and Co.*, and that such bills as the bank would discount were selected by *Bruce and Co.* who handed over the rest to *Alexander* to get them discounted *on their account*.—They contended therefore that the bill in question must be taken to have been, according to that course, sent up in effect to *Bruce and Co.* through *Simpson* in the usual

usual way, either to keep or get it discounted as they thought proper.—It was not transmitted to *Alexander* to get it *accepted* by *Bruce* and *Co.*, or to return it if not accepted; but as an already *available* instrument in *statu quo*, the produce of which was to be paid to and applied entirely for the sole benefit of *Bruce* and *Co.*—Not having been accepted by *Bruce* and *Co.* it was in the nature of a *promissory note* made by *Cooke* and *Co.* who with the indorsers would be liable on it to *Bruce* and *Co.* unless there were any thing in their character of *drawers* to preclude them from a right of suing on it at law.

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[It was admitted that no question was intended to be raised on that point.]

Whatever was to have been done with the bill it was to be done for the benefit of *Bruce* and *Co.* and it was not attempted to be proved that any of the parties were ignorant of that, and *Alexander* might at any time, consistently with his authority, have given *Bruce* and *Co.* the bill itself in the first instance instead of getting it discounted, and therewith the right to sue any of the parties upon it, for it was within his instructions to do so: or if he had received the money on it it must have been for the use of *Bruce* and *Co.*, and they might have maintained an action against him for money had and received.

[The Court turned the attention of the bar to the consideration of the legal effect of the transaction

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put thus—that the bill had been sent direct to *Alexander* with orders to pay the produce to *Bruce* and *Co.*, and that that had been followed by a subsequent countermand by *Cooke* and *Co.* of the destination of the produce—and they enquired whether it would have been considered to be the property of *Bruce* and *Co.* in the interval, and whether their getting the bill by any means in the mean while could alter the rights of the parties?]

To which it was answered, that though the order to pay over the produce might be countermanded before payment, yet, after payment, such countermand, and in the mean time, the possibility of such a countermand could have no effect; but they admitted that if *Bruce* and *Co.* had in this instance acquired possession of the bill without having any interest in it, the crown would have had no more right to seize it, than if it had been still in the hands of the postman who brought the letter; but here (they urged) the main ground on which the crown relied was, the fact of the bill having been remitted solely for the benefit of *Bruce* and *Co.*, and whatever might have been the effect of a countermand after it had got to the hands of *Alexander*, and before the produce of its having been discounted had been paid over it was enough at present to say, that there was in fact no such countermand. *Burn*, by his indorsement of the bill, gives the holder, whoever he might be, a right to recover the value against all or any of the persons liable, provided it comes to such holder's hands before the bill becomes due, and while it is
 current

current as here. That qualification of the proposition it is which distinguishes the present case from those wherein the bill had expired before it was re-issued, as was the case in *Beck v. Robley*. There can be no objection in point of law to a holder of a bill of exchange or promissory note indorsing it back to the drawer or maker for value, and however unusual that may be in course of business, that consideration does not affect the legal validity of such a transaction.

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Then there is no evidence, in the report, of the precise circumstances under which the bill got into the hands of *Bruce and Co.* or the sheriff: nor do *Cooke and Co.* complain of what has been done. There is not, in short, any one circumstance to contravene the *prima facie* title of the holders to the property in the bill: whereas it was proved on the other hand that *Burn* had received the value of the bill in consideration of his indorsement, by which he made the bill negociable in the hands of the indorsee, and he was in fact largely indebted to *Cooke and Co.* at the time beyond the amount of the bill, who no doubt might have recovered on it against him by virtue of that indorsement.

Hullock and Richardson, in support of the rule, insisted that there was no difference in point of law between the present case and that of *Beck and Robley*, and they denied that *Cooke and Co.* might have recovered against *Burn* on the bill, but contended that they must necessarily be non-suited if they had brought an action the next day, and

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that their indorsee with knowledge could not be in a better situation than they themselves.

It is quite clear the object of *Cooke and Co.* was to use the same bill twice over. If they had brought an action against *Herring* on his indorsement, *Burn* having given value for it (as he would have been held to have done in the eye of the law) would have been considered as a satisfaction *quoad Herring*. They admitted that if *Cooke and Co.* had indorsed to a *bonâ fide* holder without notice he might have recovered, but contended that *Bruce and Co.* were not such a *bonâ fide* holder, for they must have known that *Cooke and Co.* could only have issued the bill for the purpose of fraud. As to the difference said to exist in the cases where the bill is over due, the only effect of that is to preclude the necessity of proving that the bill has not been in the hands of the drawer, and cannot render a prior indorser liable anew whose liability has been once extinguished. *Burn's* indorsement could not be revived so as to render him liable to either the drawer or indorsee. *Hodgson*, in the case cited, was in the same situation as *Herring* here, and clearly the crown would not be entitled to sue the original payee on his indorsement.

Bruce and Co. had not in fact, nor were they meant to have any interest *in the bill* at all, nor were they to know any thing of it till it had been discounted, and in the mean time it remained the absolute property of *Cooke and Co.* The fallacy of
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of the argument and of the verdict lies in assuming the bill and the produce of it to be one and the same thing, and that the person for whose benefit the produce was directed to be applied was therefore entitled to be considered as having an interest in the bill itself, and not only so, but to stand in the situation of an indorsee, because by accident the bill afterwards gets into his hands whereby he becomes *literally, merely*, but not *legally* the holder; but that is not in law the consequence of such a possession so obtained. As to *Cooke and Co.* not complaining, the reason is quite obvious, for they had intended to commit a gross fraud in re-issuing the bill. For these reasons they submitted that the affirmative of the issue on this record that *Burn* was indebted to *Bruce and Co.* could not be maintained.

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The *Attorney-General*, in reply, admitted, that if *Bruce and Co.* had had no property in, or right to the bill in any way, the issue was not proved; but he insisted that they had *such a qualified right* to the bill as would have entitled them to have recovered on it against *Burn*. He denied the proposition that if *Cooke and Co.* could not recover against *Bruce* as the indorser, therefore no other holder could, for there are many cases where an endorser remains still liable to others, notwithstanding his indorsement is extinct as between him and the drawer. But here the bill was never delivered up *as satisfied*, it was delivered to *Cooke and Co.* in consideration that they

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would

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would lend *Burn* money on the credit of his indorsement, which they did, for *Burn* was at that time considerably indebted to them beyond the amount of the bill, or why does he indorse it? He must have indorsed it for the sole purpose of giving it currency, otherwise it would have been unnecessary; when it came therefore into the hands of *Bruce* and *Co.* accompanied by the order to pay them the proceeds, why might not they have immediately appropriated the bill if they had chosen to do so, or might not *Alexander* have given the bill, and with it the right to sue the indorsers? It was giving them a right either to do so, or to have sent it to *Alexander*. *Cooke* and *Co.* did not indorse it it is true, but that was because it would not have added to the value of the bill, for they were liable as drawers, and therefore it was not necessary. *Burn's* indorsement rendered him liable to any holder as much as if he had delivered him the bill, and *Cooke* and *Co.* as bankers might have been his agents for the purpose of negotiating his indorsement, and that destroys the general argument, that if *Cooke* and *Co.* the drawers, could not themselves recover against *Burn*, their transferees under any circumstances could not. That is a much stronger circumstance of distinction of this case from that of *Beck v. Robley* than that of the bill being over due.

Suppose *Burn* had carried the bill to *Bruce* and *Co.* for acceptance, and they had refused to accept it, but had advanced him the money on his
 his

his indorsement of it, what would there have been in such a transaction to object to on their parts, or to have prevented them from enforcing the bill against *Burn* when it became due. Non-acceptance is not a default in the drawee but the drawer, and under such circumstances *Bruce* and *Co.* would have been *bond fide* holders of the bill, and might have recovered on it against *Burn* as much as if it had been drawn on strangers. Any right of countermand which *Cooke* and *Co.* might have had while the bill remained in the possession of *Alexander* would have ceased on his having delivered over the proceeds *or the bill itself*, and therefore the bill getting into their hands after having been remitted for their benefit would have the same effect as if it had been sent up by *Cooke* and *Co.* to them. Then it must be considered that it is *Burn* who complains, whereas he is clearly liable to some one on the bill, and his paying it to *Bruce* and *Co.* would have so far lessened his debt to *Cooke* and *Co.* The sending the bill to *Alexander* was in fact merely done to indulge the commercial pride of the banking-house of *Bruce* and *Co.* who would not like to appear in a transaction of the sort as bill-brokers, or receive any paper which the bank would not discount; and there can be no doubt, under all the circumstances of this case, that the bill was intended to be and in effect was remitted to *Bruce* and *Co.*, and therefore the transaction gave them such a property in it as to entitle them to recover the amount from the defendant *Burn*, and if so the crown is entitled to this verdict.

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RICHARDS,

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RICHARDS, *Chief Baron*, (having consulted with the rest of the Court.) We think that as it appears probable that there may be many other circumstances in this case, in point of fact, which have not been brought before the Court or the jury, and which it would be very material to know before we can undertake to decide this important question, there ought, on that account, to be a new trial—without saying more, therefore, we make the

Rule absolute*.

* The issue was tried a second time, but the question was not brought before the Court again.

STRITCH v. HUGHES.

1817.

27th November.

LITLEDAL shewed cause against a rule obtained by *Jones* on the 25th of *June* last, for judgment, as in case of a nonsuit, for not proceeding to trial. Notice of that motion had been served on the 20th of *June*, the day of the Sittings for *Middlesex* being the 23d. The Court had granted the rule, on the ground that the plaintiff ought to have proceeded to trial pursuant to his notice. The venue was laid in *Middlesex*. The declaration was delivered in *Hilary* Term, with notice to plead in eight days. The defendant pleaded accordingly, and issue was joined in *Easter* Vacation, and notice of trial was given for *Trinity* Term, and countermanded on the 11th *June*. It was contended, that the plaintiff was bound to proceed to trial pursuant to his notice, and was not entitled to countermand it, after the proceedings which had been had, submitting the practice to be, that a plaintiff having given notice of trial for the term after that in which issue is joined, is bound to proceed to trial accordingly. And he cited *Munt v. Tremamondo* (a), and *Harman v. Gilbert* (b).

A defendant is not entitled in this Court to judgment, as in case of a nonsuit, if the plaintiff, (having given notice of trial for the next term, after that in which issue is joined,) do not proceed accordingly, but countermand his notice.

Rule to show cause, therefore, discharged on a peremptory undertaking.

On the other hand it was objected, that the notice of the present motion having been served
on

(a) 4 T. R. 557.

(b) 2 Tidd. Pr. 822.

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on the 20th, and the Sittings not being before the 23d, the defendant was premature. And on the point of the plaintiff being entitled to countermand the notice of trial given, the cases of *Dacosta v. Ledstone* (c), and *Baker v. Newman* (d), were cited, to shew, that by the practice of the Court of *Common Pleas*, the application for judgment, &c. cannot be made before the 3d Term.

The Court, recognizing the practice of the *Common Pleas* (e),

Discharged the rule, on a peremptory undertaking, and

Without Costs.

(c) 2 H. Bl. 558.

(d) 1 Ib. 123.

(e) Tidd's Practice, 822, 3.
 6th edit.

THE END OF MICHAELMAS TERM.

REPORTS
OF
CASES
 ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

 SITTINGS AFTER
 MICHAELMAS TERM,—59 GEO. III.

GRAY'S INN HALL

 REX, in Aid of OLDACRE v. TIDMARSH*.

OWEN, Sir *William*, during the last term, obtained a rule, calling on the sheriff of *Warwick-shire*

* Although there could not now (since the 53 Geo. III.) be an extent obtained, in aid of a party in the situation of the prosecutor of this extent; yet as the *principle* of this case is applicable to every case of extent, whether in aid or in chief, the present decision may yet controul similar abuses of the proceeding, still practicable, though in a more restricted degree.

mise, in consideration of staying proceedings, from the defendant, under duress of a seizure.

If more than the precise debt be received by them under such circumstances, they will be ordered to restore it, and to pay the costs of an application to the Court, for the purpose of obtaining the order: and an assignee of a bankrupt defendant, may apply.

Such a motion may be made after an application to set aside the extent altogether, which has failed.

1817.

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*Wednesday,*  
 17th December.

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 A sheriff has no right to levy costs or poundage, or any incidental expences, under an extent, on a simple contract debt; neither has he, or the attorney for the prosecutor of the extent, a right to receive any such costs, &c. under a *compro-*

1817.

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 in Aid, &c.
 v.
 TIDMARSH.

shire to shew cause why the costs and poundage, and expences received by him, in addition to the debt, under this extent, should not be refunded to the assignee of the defendant.

The rule was obtained on the application of the sole assignee of the defendant, under a commission of bankrupt issued against him 6th *February* 1816, founded upon an act committed 26th *January* then last, as stated by the affidavit of the applicant, read on moving the rule, which also stated, that the debt due to the prosecutor of the extent was 111*l.* 7*s.* 6*d.* (on a promissory note) and that the sheriff had levied 159*l.* 18*s.* 2*d.* in discharge of the debt, sheriff's poundage, and all other incidental expences, when it was prayed that the sum of 48*l.* 10*s.* 8*d.* might be restored to the applicant, for the benefit of the general creditors of the bankrupt.

In opposition to the rule the prosecutor of the extent filed an affidavit, stating, that he had been informed by his attorney, and believed, that the sheriff's poundage, and other incidental expences, were not *levied* by the sheriff, under the writ of extent, on the estate and effects of the defendant, but were *paid by agreement and compromise* between the attorney acting for the defendant, and the attorney for the prosecutor of the extent; *and in order to stay the proceedings* under the writ, which were stayed accordingly. The affidavit also stated, that the defendant's then attorney was also the solicitor concerned in the prosecution of the commission of bankrupt.

The

The attorney at *Birmingham*, who was employed in enforcing the extent there, made an affidavit to the same effect; adding, that he had in pursuance of the terms of the compromise (the sheriff having then seized the defendant's effects) delivered an account of the debt and costs, amounting to 136*l.* 11*s.* 8*d.*, and that he had received that sum, by the payment of certain persons, auctioneers in *Birmingham*, in full satisfaction; and that the demand of the sheriff for poundage, &c. had been previously paid by the same persons to the under-sheriff, in fulfilment of the aforesaid voluntary compromise.

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in Aid, &c.
v.
TIDMARSH.

Dauncey now shewed cause. He adverted to a former rule *nisi* obtained in this extent (last *Easter* term) to set aside the proceeding altogether, on the ground of irregularity, which had been discharged with costs; and inferred, that the present application was merely an attempt to effect the same object by another mode. In the case of *The King v. Van Vort**, he said, this Court had recognized the distinction between a similar compromise of a case of this sort, and a payment of costs and poundage under a levy: and he submitted,

* That case, in point of fact, decided nothing: or, at most, nothing more than that a party, misrepresenting a fact to the Court, will not be allowed his application, which might have been entertained if that fact were as stated, and *therefore* it has not been reported—*Peake* had moved to set aside an extent, because bills had been given for the debt, which had not become due; but it turned out that that was not the fact, (some of them being payable) when, of course, the rule was discharged.

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 v.
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mitted, that there was nothing in the case of a proceeding by extent, which should preclude a party from the advantages given him in all ordinary proceedings; but he principally relied on the fact that all which had been done, and was now complained of had been the result of a voluntary compromise, founded on proposals made by the solicitor for the defendant, who was also the solicitor conducting the commission; and contended, that if the sheriff was not entitled to *levy* the costs, and that if his having done so would have afforded good ground for the present application, there could still be no reason why by agreement and compromise, for the purpose of avoiding the carrying the process into effect in favour of the defendant, a party might not fairly make terms of reimbursement of his costs incurred.

Sir *William Owen*, in support of the rule, having called the attention of the Court to the stat. 3 Geo. I. c. 15, s. 13, and to the case of *The King v. Edwards* (a), and addressed himself to the point of a *seizure* having been in fact made by the sheriff, was stopped by the Court.

RICHARDS, *Chief Baron*. The only thing which struck the Court at all during this argument, was the mention of the former application, and the case of *The King v. Van Vort*. The application alluded to was, that the proceeding might be set aside altogether, on a ground which could not be supported. The case cited, was a

(a) Ante, vol. ii. p. 448.

motion

motion made on the authority of *The King v. Bebb*. It afterwards appeared there that some of the bills were in part due, so that the Court had been misled.

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As to the right of a party to costs in a case of this sort, our decision in the report of *The King v. Edwards* puts that question out of all doubt. [His Lordship read that case.] There is certainly no distinction which can affect this application, between a levy of the debt, &c. and a seizure of the defendant's goods. There was, in fact, a levy made in the eye of the law [stating the facts.] Under such circumstances this Court is bound to protect the debtor, and will treat the transaction as having proceeded from his mistake of the extent of his liability. The conduct of the other parties has been such, as ought to be checked, and this rule must therefore be made absolute.

GRAHAM, *Baron*. The former application was essentially different from the present, and then this motion was suggested by one of the Court. The case of *The King v. Van Vort* having been now brought to our recollection, has no resemblance to this case; there is, therefore, no authority against this application.

In point of fact, the defendant was under the duress of this process by the seizure, as much as if the sum had been levied, and we must not permit imposition to be effected by means of terror.

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This sort of compromise, therefore, as it is called, must not be allowed to affect persons in the situation of this defendant, for the sake of public justice.

WOOD, *Baron*. I am of the same opinion. It is acknowledged on all hands, that this money should not have been levied; and I cannot admit the excuse of its being taken under a compromise, for if it were so, the defendant has mistaken his rights. In *The King v. Van Vort* the motion was, that the sum not due should be refunded. I was of opinion, I remember then, that the poundage ought to be returned; but that rule was discharged, on the ground of its having been obtained on a false suggestion.

GARROW, *Baron*, of the same opinion.

Per curiam.

Rule absolute,

With Costs.

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Saturday,
23d December.

The ATTORNEY GENERAL v. KING and others.

THE information in this case consisted of two counts. The first, founded on the 51 Geo. III. c. 87*. charged, that the defendants being brewers of beer, did, *after the 26th June 1811*, and before, &c. to wit, *on the 13th March 1817*, receive and take into their custody and possession a large quantity (to wit, &c.) of grains of paradise, contrary, &c.; and which said grains of paradise was afterwards, to wit, on the day and year last aforesaid, *found in the custody and possession* of the said defendants, whereby, &c.—The second count charged them with receiving, &c. *on the same day and year*, a large quantity of a certain *preparation* of other grains of paradise,

and

Where a brewer is liable to the penalties imposed by the 51 Geo. III. c. 87, for receiving and taking into possession the articles prohibited by that statute to be received into possession by brewers, it is no defence to an information founded thereon, that such brewer, besides his trade of brewer, exercised another trade (ex. gr. a distiller), in which the use of such articles be lawful and necessary, and the article was found on his distillery premises.

* Which enacts, 'That no maker or makers of any such liquor as aforesaid, nor any brewer or brewers of beer, shall receive or take into his, her, or their custody or possession, any (grains of paradise, &c. &c.); and if any such maker or makers, or brewer or brewers, shall receive into his, her, or their custody or possession, any, &c. the same shall be forfeited, together with the casks, &c. containing the same; and all such, &c. &c. shall and may be seized by any officer or officers of excise; and such maker or makers, or brewer or brewers, in whose custody or possession any such, &c. shall be found, shall forfeit and lose the sum of 200l.'

An information on such a statute, charging a "receiving and taking into possession," is not maintainable, where it is proved that the act of receiving

was antecedent to the statute, although the possession has continued ever since.

A record of condemnation of goods seized, for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute.

Quere, whether such a record is conclusive evidence in any case, of all the facts stated therein, so as to affect a defendant collaterally, in any other proceeding against him, for penalties for the act of forfeiture?

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and which was also then found in their possession, whereby, &c.

On the trial before the *Lord Chief Baron*, at the sittings after last *Trinity* Term, the legal objections being taken, which are the subject-matter of the present motion, a verdict was given for the Crown for the penalty (200*l.*) with liberty to move for a new trial.

8th November.


Owen, Sir *William*, now moved for a rule to shew cause why the verdict should not be set aside and entered for the defendants; or why there should not be a new trial, on the following points:—

1st. That the defendants being rectifiers and distillers, and dealers in *British* compounds and spirits, the possession of the subject-matter of the information by them, in those characters, was lawful, as it was necessary to them in their trade of distillers, and was recognized to be so in the 26 *Geo.* III. c. 73. (among other articles), as an ingredient in the making of *British* spirits. The question, therefore, on that part of the case would be, whether the defendants, although brewers, might not be lawfully possessed of the article in question as rectifiers; or whether they were liable to the penalties, although they were also rectifiers, by reason of their trade of brewers: which, it was submitted, would be, in effect, whether the two trades could be carried on by the same person at the same time. On that point it was argued, that the

the legislature had not so intended, or it would have been so expressed in the act, as was the case in the 48th *Geo. III.* c. 60, with respect to tanners and leather-cutters; or otherwise very many persons, now carrying on the two trades together, which was very common, would be innocently liable for very heavy penalties, by construction of a penal statute, which ought to be construed strictly.

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Adverting to the evidence it was submitted, that the circumstances under which the cask had been brought on the premises, and left there openly for so long a time, negatived all suspicion of fraud.

The other point (they observed) was one which arose out of the accidental circumstances of this particular case. The act, on which the information was founded, passed in *June* 1811, and the information accordingly charged, that after that time the defendants had received and taken into their custody and possession (not charging them with receiving and having) these grains of paradise; whereas the evidence was, that the defendants had succeeded to the possession of the article, being already on the premises on the death of Mr. *King*, their predecessor, in *January* 1811, antecedently to the passing of the act; nor does the averment in the information, that the grains of paradise were found in the defendants' possession, aid the Court, because it refers to the thing before alleged to have been received, and taken into their possession.—A rule being granted,

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The *Chief Baron* now read his report of the evidence; from which it appeared to have been proved at the trial, that the defendants were considerable brewers, and were also rectifiers and brandy-dealers at *Plymouth*; that they had two sets of premises, about one hundred and fifty yards apart, one used as a brew-house, the other as a rectifying-house, and that in the *latter* there was found by the officers of the excise a cask of *grains of paradise*; that that cask was brought on the premises, and placed where it was found, *two or three years before* the passing of the act, by Mr. *Richard King*, a relation of the defendants, who died in *January 1811*, when the defendants succeeded him in the business, and became possessed of the premises and property, and, amongst the latter, to the cask of grains of paradise in question, which had remained in the same place ever since, till seized by the officers of the excise.

The record of condemnation of the cask, and contents, had been also put in and read.

The *Lord Chief Baron*, on this evidence, directed the Jury to find a verdict for the Crown, giving the defendants leave to move for a new trial.

The *Attorney General*, *Dauncey*, *Clarke*, and *Walton*, now shewed cause,—having observed, that this statute was passed with the object of remedying the statute of *Anne*, (which prohibited the
 using

using of such articles by brewers, and which it was found impracticable to detect), by enacting that no person using that trade should have such articles in his possession,—they insisted that the act had not restricted the prohibition of the possession of such drugs to persons being merely brewers only, but was general in its terms, and must be so construed. All, therefore, which it was necessary to prove in such an information as the present, would be, that the defendants were brewers (no matter what other trade they might use besides), and had in their custody or possession this prohibited article.

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(GRAHAM, *Baron*. Otherwise he might carry on, together with his trade of brewer, the business of selling these drugs, known by the name of brewer's chemist.)

If this statute be penal, it is also, in *favorem salutis*, for the protection of the health of the subject, by preventing the use of noxious ingredients in making the necessary article of beer, and should therefore be construed largely.

The ingredients in question, they observed, are so powerful a stimulant, that they are used only in small quantities at a time, which renders them easily removed from place to place, and their illegal use therefore difficult of detection. If (as has been put) it be a necessary consequence of enforcing this law, that the two trades cannot be carried on together, that is no reason why it should

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should remain inoperative on the statute-book; and if they be legally incompatible, that is tantamount to a virtual enactment, that they shall not be carried on together. The fact of the defendants being also rectifiers, therefore, they contended, was no defence to this information.

As to the other point, arising on the objection taken to the information, charging the defendants with receiving, and taking into possession these drugs, they submitted that the count would be sufficient for the purposes of this proceeding, if the latter part of it stood alone, for it was only necessary to shew that the drug *was found in the defendants' possession, after the passing of the act*, to render them liable to the penalty. The 16th section of the statute is composed of two parts: the first part of the section prohibits the receiving into possession; the other imposes the penalty on the article being found in possession. But even if that be not so, and it should be necessary to shew an actual receiving into possession, they insisted that, in point of law, every continuance of an illegal possession of prohibited articles is a new receiving; and that the subsequent part of the clause, which authorizes the seizure of the prohibited articles, on a mere finding in the possession of any brewer, shews that it was so considered by the legislature, who accordingly framed the statute with that view. Were it otherwise, the thing might be kept in possession for all time, on pretence of having received it before the passing of the act. They illustrated
 their

their position on that point, by the construction put by the Courts on the statute *William and Mary*, giving a settlement to persons *taking* a tenement, which had been held not to be confined to the mere act of *taking* the tenement, but had been extended to the possession.

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They then urged, that if any thing more were wanting to complete the case on that part of it, the record of condemnation*, which had been put in and read on the trial, was conclusive evidence of all the facts which it purports to record, and estops the defendant from now denying those facts, which he had refused to contest on the occasion of that proceeding; and they submitted that a judgment by default—in nature of which such a proceeding undefended (they observed) might be considered—was as conclusive as if obtained on the merits,

* Whereby the goods were stated to have been condemned, for “being materials and ingredients other than malt and hops, found in the custody and possession of *Phillis King*, *John King*, and *Richard King* (the defendants), to be mixed, compounded, fabricated, manufactured, and prepared into a liquor, to imitate and resemble, and to be mixed with and used, as beer brewed and made from malt and hops.”

That proceeding was founded on the 42 *Geo. III. c. 38, s. 20*, which enacts, that “No person shall mix, compound, fabricate, manufacture or prepare, or cause, &c. (*inter cetera*), grains of paradise, &c. &c. or any other material or ingredient whatever, (except malt and hops,) any liquor to imitate or resemble, or to be mixed with, or used as beer or ale brewed from malt and hops: and that all such liquor so mixed, &c. and all the prohibited articles in the custody or possession of such person or persons, together with every copper, &c. shall be forfeited, and may be seized by any officers of excise.”

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merits, because it is an admission of every thing so not denied. In support of these propositions, they cited the MSS. cases in the margin*, and also those of *Geyer v. Aguilar* (a), and *Scott v. Shearman* (b); in the first of which
Lord

1797.

Trinity
Sittings.

* *The King v. Matthews*.—MS.

THIS was a *scire facias* on a bond, conditioned that a certain boat should not be employed in smuggling.

It was proved on the trial, on the part of the Crown, that a boat, called *The Ranger*, belonging to the defendant, was seized by a custom-house officer, for importing spirits without payment of duties.

The record of condemnation of the boat was then put in and read, which it was insisted on, by the *Solicitor General*, was conclusive evidence of the defendant's having forfeited the bond, by the smuggled spirits being seized in a boat called *The Ranger*, and that that was his boat; when, notwithstanding Mr. *Rous* strenuously opposed it, the Lord Chief Baron held the record of condemnation (*cum causâ*) of the boat, conclusive evidence of the defendant's having broken the condition of his bond.

1797.

Sittings after
Michaelmas.

The Attorney General v. Wakefield.—MS.

THIS was an information against the defendant, who was a paper-maker, for removing paper before it had been charged, and an account taken of it by the officer.

Dallas proposed calling a witness, to prove that the condemned brown paper was "sheathed paper," and which was exempt from duty, with a view to exonerate the defendant from the penalty sought by the fifth count of the information, for sending paper from the mill, before the officers had taken an account of it, which penalty could not apply to any paper not liable to duty.

The

(a) 7 T. R. 696.

(b) 2 Bl. 979.

Lord *Kenyon* said, that Lord *Mansfield* had, after having entertained doubts on the point of whether,

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The Lord Chief Baron, however, refused, to let the witness be examined; and ruled, that the record of condemnation was conclusive evidence of the seized paper being liable to duty, and that it had been sent out from the defendant's mill before the officer had taken an account of it, as was stated in the record of condemnation.

The Attorney General v. Reynolds.—MS.

THIS was an information against calico-printers, for eight-penny penalties of 20*l.* each.

1804.
Sittings after
Hilary.

The goods were differently described in the different counts of the information.

The defendants were charged, by the first count, with beginning to print eighteen pieces of stuff, wholly made of cotton-wool wove in *Great Britain*, the same, or either of them, not being dyed throughout of one colour only, &c. before the same had been measured and frame marked, and which were found in defendant's possession, contrary to 25 Geo. III. c. 72, s. 9.

The eighteen pieces of stuffs, which the defendants were charged with having so printed before they were frame-worked, had been condemned for the following cause of forfeiture, viz. for being calico, linen, and stuff printed, painted, and dyed in *Great Britain*, by *John Reynolds* and *Charles Reynolds*, being printers, painters, stainers, and dyers of calicoes, linens, and stuffs, before the same, or any or either of them, had been measured and marked at both ends thereof, by the officer of excise, with a frame-mark, denoting the measure thereof.

Without the previous examination of any witness, the Solicitor General called for the record of condemnation; which being read by the clerk in court, the Solicitor General said, that it was conclusive evidence as to the first count of the information,

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ther, in an action brought against an officer of the customs or excise, a condemnation of the goods seized by judgment of the Court of *Exchequer*, was conclusive in favour of the defendant, had ultimately

information, and that he did not wish to carry the case further.

Dauncey said, that he did not mean to controvert the effect of the record, as far as it went, but strenuously insisted that it was no evidence at all, to attach the pecuniary penalty on the defendants.

The *Solicitor General* and *Dampier*, in answer, cited the above cases of *The King v. Matthews*, and *The Attorney General v. Wakefield*.

And, in the course of a very full and long discussion, the *Lord Chief Baron* observed, that the fact of the pieces not having been stamped was proved by the record, which could not be controverted; and that in cases where any fact was averred, it was conclusive evidence of that fact; and as the record asserted, that the defendants had begun to print before they had frame-marked, his Lordship would not hear any thing against that fact, where the record was produced.

Dauncey and *Hughes* then attempted to shew, that the description of the goods in the record of condemnation, did not agree with the description of any goods which defendants were, in the penal information, charged with printing before they were frame-marked.

To that it was answered by *Dampier*, that having shewn that eighteen pieces of linen were seized, the information calling them eighteen pieces of linen was sufficient. His Lordship held, that the record of condemnation meant the same goods, which were called in the penalty linens and stuffs, and therefore over-ruled the second objection; on which the *Solicitor General* took a verdict on the first count for the eighteen penalties, of 20*l.* each, amounting to 360*l.*

ultimately acquiesced in that opinion; and, in the latter case, it was held, after much discussion and deliberation, that a record of condemnation of goods seized was conclusive *in personam*, and precluded the owner from giving evidence, that the goods were not actually seizable; and many cases and authorities are brought together, in the report of *Scott v. Shearman*, in favour of that position.

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Both on the facts, therefore, and the law of this case, they contended, that the Crown was entitled to the verdict which had been recorded.

The *Common Serjeant*, and *Owen Sir William*, in support of the rule, insisted preliminarily, that in all cases of proceedings on penal statutes, there could be no construction inferred against the subject, where the offence was not express, and that every penal charge must be taken strictly *secundum allegata et probata*. They then, on the first point, submitted, that as the act, making it unlawful for a brewer to receive and possess the drug in question, had not in words declared that a brewer should not also exercise the trade of a distiller; the defendant was therefore not within the statute, a brewer using, &c. for he was also a distiller, and in that latter trade, and on premises entered and used in that trade, and lying apart from his brewery premises, he kept the drug: it was not, therefore, in his possession as a brewer but as a distiller.

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In all the acts of parliament, which were intended by the legislature to have the effect of prohibiting the union of trades, which being exercised by the same person, might facilitate practices which the particular statute was meant to suppress, the carrying on such trades concurrently was expressly and in terms prohibited, as in the case of a tanner and leather-cutter, butcher, &c. (c); that, therefore, was sufficient to shew, that express enactments were held necessary, in all such cases, to abridge the natural liberty of the subject, in the choice and exercise of whatever trades he might be disposed to adopt jointly, and at one and the same time.

That general question, therefore, in all its bearings, and with all its consequences, having been brought fully before the Court,

They then adverted to the fact (as it affected this particular case) of the defendants having had the article in their possession before the passing of the act; and they put it to the Court, whether a brewer having a very large quantity of this material in his possession innocently, before the passing of this act of parliament, on a general speculation of a rise in the market, would have been obliged to sell the whole *eo instanti* that the bill passed into a law, even though at that moment the price should have fallen so considerably, as that to be obliged to dispose of the commodity would be his

(c) Stat. 1 Jac. I. c. 22. s. 4 & 6.

ruin ?

ruin? And they pressed the hardship of that supposed case. They then contended, that a case of receiving before the passing of the act, could not be brought within the words of the statute: and that the article being found in the brewer's possession; was neither a constructive receiving, nor was it a distinct integral offence, created by the statute, independent of the act of receiving. In the present information the count related throughout to the first antecedent, the receiving, and having charged the defendants with so "receiving," &c. it concluded by stating, "and *which said quantity*, &c. was afterwards found," &c. obviously applying to the grains of paradise so received, *i. e.* before the statute. There could be no splitting the count, so as to take advantage of any such alternative, as it had been contended the laying of the charge afforded. The act itself says nothing of a retainer of what has been previously received; and therefore, according to the constitutional and legal rules of construing penal statutes, it cannot be extended to this case. The words of the act are, "who shall *receive* and *take* into"—not and "*have* in—possession" (obviously applying to an original taking), whereas there is no proof in this case of either the one or the other.

[GRAHAM, *Baron*, suggested, that a possession in one county of goods stolen in another, was a felonious taking in the former.]

But this (they repeated) was a case of construction of the express words of a penal statute,

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which operated in restriction of trade, making an act previously innocent in all respects, an offence against a revenue law. As to the 8 and 9 *William* and *Mary*, they submitted that the object of that statute rendered it quite distinguishable from the present. That was an act, giving the subject *a benefit*, and therefore to be construed liberally, so as to extend, rather than restrain its effect. On that point also they submitted that this rule should be made absolute.

Then, applying themselves to the question of the defendants being concluded by the effect of the record of condemnation, they denied that that was the effect of it in law; for such a proceeding, they submitted, was *alio intuitu*. Besides, the subject-matter might be of so trifling importance, as not to be worth contest; and if that could be shewn to be the fact, on what principle, they demanded, was a record of the condemnation of the article condemned, to be considered as conclusive and unanswerable evidence of the act incurring the forfeiture. In practice, the record of condemnation does not state the cause of forfeiture, and the condemnation itself may have been the result of other conduct, than that with which the defendants are charged by this information. They admitted that the record of condemnation was conclusive, as to the fact of condemnation, so as to obviate any question as to the goods having been forfeited, and having been legally seized, or as to the right of the Crown to the property seized; but, beyond that, they contended that it

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was not conclusive, and particularly that it could not be considered evidence of any act which amounted to an offence, or subjected the owner to penalties in an information on another statute, making the act of forfeiture also highly penal; and that it would be hard in itself, and mischievous in its effects, if it were so held. In *Geyer v. Aguilar* (they observed), that all that Lord *Kenyon* had said was, that where there has been a proceeding in the Exchequer, and a judgment *in rem*, as long as the judgment remains in force it is obligatory on the parties, who have *civil* rights depending on the *same question*. In *Scott v. Shearman* also, the question arose on a *civil* suit, and even there Mr. J. *Blackstone* at first entertained great doubt; but, as far as that case goes, the point might be admitted, without prejudice to the present question, where the proceeding is not of a civil nature, but charges an act made an offence under a penal statute. They also submitted, that the record of condemnation could not be received as evidence in this case, for another reason, because that condemnation had been founded on a different statute, (the 42 Geo. III. c. 38,) and which is not confined to brewers; whereas this proceeding was instituted on an entirely different statute, the 51 Geo. III. c. 87, and which related to a totally different offence.

On the whole, therefore, they submitted that the rule should be made absolute.

The *Attorney General*, in reply, contended, that the original act of taking was not the *sub-*

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stance of the offence; the offence was, in effect, the illegal possession, and the time of acquiring such possession was not a necessary ingredient in that offence, otherwise the act might be easily evaded: as if a man, who is not at the time a brewer, gets possession of the prohibited article to-day, as he lawfully may, and afterwards he chooses to become a brewer, according to the construction now contended for, he would not be amenable to this wholesome law. There is a clause in the act, limiting the brewer's liability to be sued for the penalties to three years; now it may be possible, that although the article may have been *received* by the brewer illegally originally, yet if it be not found in his possession till after the three years, he may safely keep it for any time. In both those cases he might violate the law with impunity, unless, taking the whole of this count together, the proof of the allegation would bring him within the statute. It is, in short, on the meaning and object of the act, that this whole question should turn.

On the other point, arising from the fact of the union of the two trades in the person of the defendant, he submitted that it was of the highest importance that that should be well understood; and contended, that all that was to be enquired of in such cases, was merely whether the defendant was of the trade enjoined from using the prohibited article; and if he were, his being of another trade not so enjoined, was beside the question: otherwise another and much wider door for evading this, and all other such statutes, was open at once,

once, even to the consequence of rendering them altogether nugatory.

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As to the question of the conclusive testimony furnished by the record of condemnation, he admitted that that record did not state that the defendants were brewers: but submitted, that its shewing that the articles had been forfeited and condemned, sufficiently squared with the provisions of this statute, and the averments of the present information; to which, if the defendant's being a distiller were a sufficient defence, it would have also been an answer to the seizure, proving, conclusively, a conversion of the article from their premises and business, as rectifiers, to be used in their trade of brewers: and that as it could not have been subject to seizure for any other offence, the record was positive, and could not be controverted.

[Wood, *Baron*, observed, that this condemnation proceeded on the 42d of the King: his Lordship read the words of the record, and of the act, to shew that the proceeding was founded on *that statute*; and expressed himself desirous that he might be understood as giving his opinion, that no immaterial allegation, contained in such a record—such as the names of the parties in whose possession the goods were found, which had, in this case, been introduced under a *scilicet*; and which loose allegations, his Lordship observed, should not be introduced into a record of condemnation,—ought to be admitted in evidence on its authority.]

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It was then submitted, that the present was not a criminal, but a civil proceeding, like the usual action by a common informer for penalties; that the proceeding by information was the only mode in which the Crown could sue the subject on statutes of this description; and that, therefore, no argument could be founded, as had been attempted, on any such supposed distinction.

For these reasons, he contended, the rule ought to be discharged.

Cur. adv. vult.

Before the Court proceeded to give judgment, Sir *William Owen* took an opportunity of mentioning, as an authority in favour of the defendants, *Cole's case (d)*, who was indicted for "*receiving and having*" in his possession naval stores. The Jury found him guilty, but said that they did not find that he received the stores after the 28th day of *July* 1800, but only that he had them in his possession after that day. Judgment was respited, to take the opinion of the Judges; when there being a difference of opinion between them, as to whether the statute ought not to be construed in the disjunctive, the prisoner was in consequence ultimately recommended to mercy.

22d December.

RICHARDS, Chief Baron, now delivered the judgment of the Court (*Mr. Baron GABROW* abstaining from giving any opinion, having been

(d) 2 East's P. C. 767.

Attorney

Attorney General at the time when the information was filed).

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[After stating the pleadings,—the object of the information (which, his Lordship considered as involving a question of great importance to all common brewers, and particularly to those who united with that trade the business of a distiller),—and the facts.] The act—51 *Geo.* III.—(continued his Lordship) is directed simply against brewers having this article in their possession. At the same it is clear, that rectifiers of spirits may lawfully possess the ingredient, (26 *Geo.* III.) c. 73. One objection made for the defendant was, that being a rectifier as well as brewer, he was entitled to have these grains of paradise in his possession, as a rectifier, without rendering himself liable to the penalties of the act, for possessing them in his character of brewer. On that part of the case there is no doubt in the minds of the Court. We are clearly of opinion, that he would be equally liable to the penalties laid in the information, to have been incurred by him for that offence, for the act makes no exception in favour of brewers who are also, at the same time, rectifiers, and the defendant is not the less a brewer, because he happens also to be a distiller. The statute is general, and applies to all brewers, under any circumstances. The consequence must certainly be, that the two trades cannot be carried on together: and if that was one of the objects of the statute, it might perhaps have been more candid to have declared it, which would have obviated all doubt; but be that as it may,

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may, the effect is obvious. So far, therefore, we have had no difficulty.

Another question was made, on the record of condemnation of the article itself having been given in evidence, on the trial, by the Attorney General, as conclusive of the facts recorded in that document. Without entering into any opinion as to what would be the effect of such a piece of evidence, where it might be offered in a proper case, it is sufficient for the present to say, that we are of opinion that that record does not apply in this instance, because it was founded upon another statute, and did not proceed on the ground of any of the offences created by this act of parliament, and therefore it is altogether out of the present question.

We must therefore take it, that on the trial of this information the cask containing the drug, was proved in the common way to have been found in the possession of the defendant; and it was contended, in the argument for the Crown, that that was sufficient evidence to satisfy me, and the Jury, of the fact of a *receiving and taking* into possession, within the meaning of the act of parliament. Possession is, undoubtedly, *prima facie* evidence of a receipt and taking. So far, therefore, the case was made out; but then the defendant, in answer to that, proved, satisfactorily, that he had received the cask into his possession a very considerable time before the act of parliament had passed. In fact, it had been left on the premises by the defendant's predecessor

predecessor in the business, where it had remained openly, ever since, unused.—(Here his Lordship adverted to the evidence of those facts.) There was, therefore, no fraud imputed, and the original possession was an innocent one. Then the question is, whether that being proved, there was before the Court, on the whole case, evidence to shew, that the defendant had received and taken these grains of paradise into his possession after the act had passed, so as to bring him within the penal clause. In common parlance, every reception imports a delivery; and, if so, the defendant cannot be brought within the meaning of this law, as having received the article into his possession, unless a delivery could also be proved after the passing of the act. Here, on the contrary, it was originally delivered to his predecessor, and not to him; and we are then called on to say, whether his possession, after the act passed, is not a receipt of the thing after the act. It certainly seems to me to be impossible, so to separate the acts of receipt and delivery, or to admit the idea of a receipt, as unconnected with that of a delivery. The root of the word is *recipio*, which has an active signification. It is most probable too, that in framing the statute the legislature had in contemplation the primary act of receiving, at the time of delivery. Certainly the thing which was delivered to a man yesterday, cannot be said to be received into possession by him to-day. Sir *William Owen*, who argued this point with great ability, has also furnished us with an authority (*Cole's case*) from *East's Crown Law*, which is in point.

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Then this is a penal statute, and must be construed strictly. Therefore as the word "received" cannot import any thing but a receiving, at the time of delivery; and as this article was received in that sense of the word before the passing of this act, the defendant cannot be considered as liable to the penalty imposed by it on the offence with which he is charged, because the act took place before the passing of the law. The receiving the article, therefore, being a positive act, the mere possession of it cannot be considered as a new act of receiving committed by the defendant, amounting to the offence charged against this statute.

The rule must therefore be made absolute, as to the first part.

[GARROW, *Baron*, after the judgment had been pronounced, expressed his entire concurrence in the result, and the reasons given by the *Lord Chief Baron*.]

Per Curiam.

Rule absolute: as to the
 Verdict being entered
 for the Defendant.

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In the Matter of BOWLER, attainted of Felony.

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Demurrer. 23d December.

THE several important questions which arose on this demurrer, were founded on certain facts, which are fully detailed in the proceedings on the record—the construction of two royal grants—and the pleadings: the substance and material parts of which are given in a note to the corresponding part of the case.

Construction of royal grants.

Grant of a liberty in a certain manor to A. who grants the manor, with, &c. to the crown. The crown grants the manor again to B. with all, &c. liberties, &c. in, &c. in as full and ample manner as A. had it—such re-grant passes nothing, but what is expressly mentioned in words, as the subject-matter of such grant, notwithstanding the words of reference to the former grant, which do not extend the operation of the later beyond the precise terms of the patent.

[It has become necessary to set these out more fully than usual, in consequence of the Lord Chief Baron having gone most minutely into the terms and tenor of the grants, and the pleadings (which will, besides, be found to be very special, and of considerable novelty), in the course of the industrious and elaborate judgment pronounced by his Lordship in delivering the opinion of the Court on this case, which seems to have principally proceeded on a diligent attention to the language and object of the letters patent, aided by the averments introduced in the pleadings.]

A grant of a liberty in a manor of goods and chattels of tenants in such manor, attainted of felony, is confined to the goods &c. of felons being locally situate within the manor, and does not pass goods &c. lying out of it. *Semble*, that if the words were "in, of, or upon," it could not be so extended.

If the words "*Ex certâ scientiâ, speciali gratiâ, et mero motu*," reduce a royal grant to the rules of construction to which the grants of private persons are subject, doubted.

Stock, and money in the funds, are not goods and chattels, and do not pass by a grant of *bona et catalla felonum*.

Stock has no locality, except for purposes of probate and administration.

Stock is a *chose in action*.

An

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An inquisition had been issued, on a commission to enquire of what lands, &c. *Thomas Bowler* (a felon) was seised, &c. at the time when, &c.

The defendants, who claimed the goods and chattels of felons convict and attainted within the manor of *Harrow*, pleaded to the inquisition their title to the beneficial interest in the manor and its appendant franchises,—to which the Attorney General replied.—The defendant demurred to the replication.—Joinder by the Attorney General.—(See the pleadings, p. 237-8-9-40.)

By the commission, which was issued 26th of *January*, 53 *Geo.* III. addressed to certain commissioners therein named,—reciting, that at the General Quarter Sessions of the Peace for the county of *Middlesex*, held on the 29th of *June*, 52 *Geo.* III. it was presented, that *Thomas Bowler*, late of the parish of *Harrow* (*Middlesex*), yeoman, on the 30th *May*, in the same year, with, &c. &c. did shoot at one *William Burroughs*, &c. &c.; that on the 1st *July* (following), at the gaol delivery of *Newgate*, holden, &c. the said *Thomas Bowler* was charged with and convicted of the said felony in the said indictment specified, and adjudged to be hanged; by reason whereof all his lands, &c. escheated, and all his goods, chattels, debts, credits, specialities, and sums of money, which he or any person had for his use, at the time of his conviction and attainder, became forfeited to the Crown;—the said commissioners, or any three or more of them, were therefore empowered to enquire

quire of what lordships, manors, lands, tenements, and hereditaments, and of what annual value, and what estates therein, the said *Thomas Bowler*, or any other or others was or were seised to his use, on the said 30th of *May*, (the day on which *the said felonies were committed*,) or ever afterwards, &c. &c.; and who hath since taken the mesne profits, &c. and in whose possession, &c. the same then were; and of what *lord or lords, and by what service or services, and by what tenure or tenures the same* were holden; and whether the same, or any and which of them, had escheated and devolved, and come to his Majesty; and also what and what sort of leases, or grants of lands, tenements, or hereditaments, and what *and what sort of annuities or annual rents, and what and what sort of goods and chattels, and of what value, and what and what sort of debts, credits, specialities, and sums of money*, the said *Thomas Bowler*, or any other or others for his use, had on the aforesaid 1st of *July*, in the 52d year of his Majesty's reign aforesaid, on which day the said *Thomas Bowler* was *convicted and attainted* as aforesaid, or at any time since; and of all other articles, matters, and circumstances, concerning the premises aforesaid, or any of them whatsoever; and the said lordships, &c. &c, so as aforesaid, to be found to enter upon, and seize into his Majesty's hands.

On that commission an inquisition was taken, 15th *February* following, whereby it was found that *Bowler* was, on the 30th *May* (the day on which

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which he committed the said felonies), seized to him and his heirs, in fee simple, of certain freehold messuages and premises in the parish of *Harrow*, and of certain other premises, mortgaged in fee, all of which were holden by him of his Majesty in free and common socage, in right of his royal crown, but not subject to any services or rent in respect thereof except fealty, and had devolved to his Majesty as an escheat, in right of his prerogative royal.

And it was also found that he (*Bowler*) was on the 1st day of *July*, and at the time when he was convicted, and received judgment, &c. possessed of certain leasehold property, and residues of terms of years therein, of considerable value, partly situate in the parish and manor of *Harrow*, and partly elsewhere.

And it was found that he was also possessed of and entitled unto the sum of 4,500*l.* capital or joint stock 3 per cent. Consolidated Annuities, transferable at the Bank of *England*; and also of and in the sum of 2,000*l.* capital or joint stock 4 per cent. Annuities, transferable at the Bank of *England*; which said sums of 4,500*l.* 3 per cent. Consolidated Annuities, and 2,000*l.* 4 per cent. Consolidated Annuities, were then standing in the name of the Accountant General of the High Court of Chancery, in the books of the Governor and Company of the Bank of *England*, on the credit of a matter, entitled '*Thomas Bowler, a lunatic*;' and that the said Accountant General had

had also received the sum of 157*l.* dividends thereon; and that he was, on the said first day of *July* last, possessed, as of his own proper goods and chattels, of and in the several goods and chattels mentioned in the schedule thereunto annexed, which they found to be of the value of 1,159*l.* 18*s.* then mostly in the possession of *Eliz. Heydon*, of *Apperton*, and that there were certain debts due to him.

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All which said tenements the jury found to have become escheated; and all which said residues of terms of years, annuities, goods, chattels, and sums of money, of which the said *Thomas Bowler* was so possessed, the jurors found to have become forfeited to his Majesty; and all which the said commissioners returned, that they had, in obedience, &c. seized into the hands of his Majesty.

On the 5th of *May* (*East. Term*, 53 *Geo. III.*), the defendants entered their claim (the legal estate being in them*), and pleaded as follows:—

‘ And now, nevertheless, to wit, on the 5th day of *May*, in this same term, come here *Francis Capper*, and *Elizabeth* his wife, and *James Pierson*, by *Hutton Wood*, their clerk in court, and claim all the aforesaid *residues of terms of years, annuities, goods and chattels, and sums of money*, of the aforesaid *Thomas Bowler*, late convicted and attainted of felony by the said commissioners, &c. into the hands of his said Majesty, taken and seized as aforesaid, being goods and chat-

* Lord *Northwick* was lord of the manor.

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tels, and property of felons convicted and attainted, belonging and appertaining to them the said (claimants) defendants, (and having cravedoyer of the premises, which, &c. and day having been given, from time to time, till fifteen days from the day of *Easter*, 54 *Geo. III.*): at that day they appeared, and complained that they were grievously vexed and disquieted under colour of the premises; and that the aforesaid residues of terms of years, &c. &c. of the said *Bowler*, late convicted, &c. were taken and seized by the said commissioners into the hands of his said Majesty, by colour of the aforesaid commission: and that the less justly, and that they, the said defendants, were withheld from the possession thereof by the aforesaid commissioners, and that also the less justly; and thereupon the said defendants, for plea and title to the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, in the aforesaid inquisition, and the schedule thereunto annexed contained, said, that there was a certain record had and noted before the Barons of this Exchequer, at *Westminster*, in the memoranda of the same Exchequer (to wit), amongst the records of the term of *St. Hilary*, in the 17th and 18th years of the reign of his late Majesty King *Charles II.* upon the roll on the Treasurer's Remembrancer's side, in these words, &c. &c.* (setting it out.)

And

* EXTRACTS FROM THE RECORD.

Middlesex.—The claim of *Joseph Herne, Esq. Thomas Davis, Esq. and Edward Palmer, Esq. and Alice his wife*, proprietaries of the manor of *Harrow*, otherwise *Sudbury*, otherwise

And the said defendants further said, that the estate, title, interest, claim, and demand of the said

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wise *Harrow upon the Hill*, TO HOLD to them, and the heirs and assigns of the said *Edward Palmer*, and *Alice* his wife, &c. &c. (enumerating the various subject-matters of the grant, in the words of the letters patent); all and singular which liberties, &c. they, by their attorney, claimed to belong to them, and the heirs and assigns of the said *Edward Palmer*, and *Alice* his wife: because they said, that in the first year of the late King *Edward* the 4th, the then Archbishop of *Canterbury* was seised in his demesne as of fee, in right of his archbishopric of and in the aforesaid manor, &c. with, &c.; and being so thereof seised, the same *Edward*, &c. by his letters patent, &c. bearing date at *Westminster*, the 15th day of *April*, in the second year of his reign, after reciting various former grants of his progenitors and successors, and confirmations, and extensions thereof, all of which he himself confirmed. And reciting, that the said *Edward* the 4th being moreover willing to shew to the said archbishop more abundant grace in that behalf, &c. &c. DID grant and confirm, and by the same letters patent did, for him and his heirs, as much as in him laid, declare, grant and confirm, that the aforesaid then archbishop, and his successors, and all their men and tenants, as well entire tenants as not entire tenants, residents and *non-residents*, and all other *resiants* IN, OF, OR UPON the lands, lordships, possessions and fees of the aforesaid then archbishop, and his successors, although they should be tenants of the same king or his heirs, or of any other persons whomsoever, should be quit throughout his whole kingdom of *England*, of all toll in every market, and in all fairs, and in all passages of bridges, rivers, ways, and the sea, throughout his whole kingdom of *England*, and all the lands of the same king, wherein he might give them liberty; and that all the goods, chattels, and merchandizes of the aforesaid archbishop, and his successors, and of all their men and tenants, as well, &c. in, of, or upon the lands, lordships, possessions, and fees aforesaid, although they should be tenants of the same king, or his heirs, or of any other persons whomsoever, should likewise, throughout the whole kingdom of *England*, be quit of all manner of pannage, passage, lastage, stallage, carriage, pessage, terrage, trevage, pontage, cheminage, anchorage and wharfage,

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said *Joseph Herne, Thomas Davies, Edward Palmer*, and *Alice* his wife, of and in the manor, fines,

wharfage, and of suits to be made to shires and hundreds, and lasts of hundreds, to the same king and his heirs belonging; and also that they *should have the goods and chattels of such tenants, resiants and non-residents, and of other resiants whomsoever, felons convicted, attainted or outlawed, or of any others whomsoever, condemned to die, as well at the suit of the king, as at the suit of the king and others, or at the suit of any others whomsoever*; and also the goods and chattels of such tenants, residents and non-residents, and of other resiants whomsoever, convicted and attainted, or outlawed *for any contempts, trespasses, debts, accounts, or any other offences whatsoever*, or for any other occasion or cause whatsoever, as well at the suit of the king, or his heirs, as at the suit of the king and others, or at the suit of a party; and all the goods and chattels forfeited of all the men and tenants of the aforesaid archbishop, and his successors, as well entire tenants, residents and non-residents, and other resiants whomsoever, in, of, or upon the *lands, lordships, possessions, and fees of the aforesaid archbishop, and his successors*, although they should be tenants of the lord the king, or his heirs, or of any other persons whomsoever, and of any felons of themselves whomsoever, and of all other felons, fugitives, or outlaws, so that if either of their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other resiants whomsoever, in, of, or upon the lands, lordships, possessions and fees of the aforesaid archbishop, and his successors, for any felony whatsoever, ought to lose his life or member, or should fly, and would not abide judgment, or should be outlawed, or should commit any trespass, forfeiture, or thing whatsoever, whereby he ought to lose his chattels and lands in any court whatsoever, where justice ought to be done on him, whether it should be before the king himself, or, &c. &c.; and also, that the aforesaid archbishop, and his successors for ever, should have the deodands, treasure-trove, wreck of the sea, and all the goods and chattels, called stolen goods, found or to be found with any person whomsoever, *in, of, or upon the lands, lordships, possessions, and fees aforesaid*, and by the same person, before any judge whatsoever avowed. And that it should be lawful to them, their

finer, issues, amerciaments, forfeitures, penalties,
 liberties, franchises, pre-eminences, profits, com-
 modities,

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their ministers and servants, without any impediment of the said lord the king, or his heirs, and all other the officers and ministers aforesaid, and also of the sheriffs, escheators, coroners, mayors, bailiffs, and other ministers whomsoever of the said lord the king, and his heirs, *to put themselves in possession of the goods and chattels aforesaid whatsoever, in all and singular the cases aforesaid, and other cases whatsoever, when the officers, bailiffs, or ministers of the said lord the king, or his heirs, might not, or ought not to seize the goods and chattels aforesaid, into the hands of the same lord the king, or into the hands of his heirs, if they should belong, or might belong, to the said king, or his heirs: and the same goods and chattels to the use and profit of the aforesaid archbishop, and his successors, to receive and have for ever, although the same goods and chattels shall have been first seized by the same king, or by the officers and ministers of him, and his heirs, on the occasions aforesaid, or either of them; and that the aforesaid archbishop, and his successors, should have, for ever, the returns of the writs of the said lord the king, and of the precepts whatsoever of the same king, and his heirs, &c. &c. except in default of the said archbishop, or his successors, or their ministers, in the lands, lordships, possessions, and fees abovesaid. And moreover, that the aforesaid archbishop, and his successors, for ever, should have all manner of fines for trespasses, oppressions, extortions, deceits, conspiracies, concealments, regratings, forestallings, maintenance, ambidexters, falsities, and other misprisions and occasions whatsoever, and all fines for licence of agreement, and all amerciaments, ransoms, issues forfeited, and all fines adjudged and to be adjudged: and all forfeitures, as well by writs of attain, or writs of "decies tantum," or "premunire facias," adjudged or to be adjudged, as by all other writs and mandates whatsoever, of all their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents whatsoever, in, of, or upon the lands, lordships, possessions and fees aforesaid, as well before the said lord the king, and his heirs, as before, &c. &c. And also the escapes of felons OF AND IN the lands, lordships, possessions, and fees aforesaid, and all other things which to*

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modities, and hereditaments aforesaid, by good and sufficient conveyances and assurances in the law, came

the said late king, or his heirs, *MIGHT or ought to belong**, as well of the said escapes of felons, as of murderers and felons, of all their men and tenants, as well entire tenants, &c. and of all other the ministers of the said late king, and his heirs aforesaid; and also all manner of fines and ransoms for any cause whatsoever arising, and the amerciaments whatsoever which then passed, or thereafter should pass, in demand of any town and hundred, *in, of, or upon* the lands, lordships, possessions, and fees aforesaid, although they should be tenants of the said late king, or his heirs, or any other persons whomsoever, in the court of the said late king, and his heirs, &c. &c.: where the aforesaid men, and their tenants, as well entire tenants, &c. &c. *in, of, or upon* the lands, lordships, possessions, and fees of the aforesaid archbishop, and his successors, although they should be tenants of the said king, or his heirs, or of any other persons whomsoever, should make ransom, or happen to be amerced, forfeit, issues, or to be condemned in escapes of felons, murders, or felonies; and which fines, amerciaments, ransoms, issues, escapes of felons, murders, and felonies, ought to have belonged to the said king, or his heirs, if the same had not been granted to the archbishop aforesaid, and his successors. And that the said archbishop, and his successors, should have, receive, levy, and collect by themselves, and their ministers, in form aforesaid, all such fines and ransoms, issues and amerciaments, and all the forfeitures, things and profits aforesaid whatsoever, without the impeachment of the said lord the king, or his heirs, or his or their ministers whomsoever, although the same men and their tenants, as well entire tenants as not entire tenants, residents and non-residents, and all other residents, were tenants of the said king, or his heirs, or of any other persons whomsoever: although also the pledges or manucaptors of the said men, and their tenants, as well entire tenants, &c. or either of them, should hold of the said lord the king, or his heirs, or of any other person or persons *elsewhere*, or that they, or either of them, were not or was *not resident or non-resident, in, of, or upon* the lands, lordships, possessions, and fees aforesaid.

* N. B. As to the money in the funds.

Moreover

came to and vested in them, the said defendants, in right of the said *Elizabeth* and *Frances*, before the

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Moreover the same king granted for him, and his heirs, that the aforesaid archbishop, and his successors, for ever, might make two constables, or more, at his or their pleasure, in any hundreds whatsoever of the same archbishop, and his successors, as often as and when to the aforesaid archbishop, and his successors, and every of them, it should seem necessary and fitting; and that as well the aforesaid constables, so made, and every of them, should have power to execute and exercise all things, which to the office of constable in the aforesaid lands, hundreds, and in the aforesaid lordships, possessions, and fees, within the hundreds aforesaid, pertain to be done, as often as and when it should be needful and necessary: so that no coroner of the said king, or constable of the said king, should enter the hundreds aforesaid, or either of them, to do or exercise any thing there, which to the office of constable belonged, in anywise howsoever; and if any such constable of the said king, or his heirs, should enter the hundreds, to do any thing which to the office of the hundreds aforesaid belonged, and should exercise and use his office there, that every thing done by such constables, or either of them, in that behalf, should be void, and held for nothing.

And further, of his more full grace, he granted for him and his heirs, to the same archbishop and his successors, for ever, that no sheriff, bailiff, or other minister of the said king, or his heirs, or of any others whomsoever, should attach or take any such man and tenant, as well entire, &c. in, of, or upon the lands, lordships, possessions, and fees aforesaid, or without, although they should be tenants of the said late king, or his heirs, or of any other persons whomsoever, by writ, precept, or any other warrant or cause whatsoever, within the county or counties where they should be resident: provided that execution of such writs, precepts, or other warrants whatsoever, might duly be made within the lands, lordships, possessions, and fees aforesaid, by the same archbishop and his successors, or their ministers, although such sheriff, bailiff, or other ministers, should find any such men their tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents, without the lands, lordships,

possessions,

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the 30th day of *May*, in the fifty-second year of his said present Majesty, the day on which the said felonies

possessions, and fees aforesaid, within the county or counties where they were so resident, and it had been commanded to the same archbishop, and his successors, or their ministers, to make execution thereof, if it were not in default of the same archbishop, and his successors, or their ministers. And that the aforesaid archbishop, and his successors, as well in the presence of the said king and his heirs, as in his and their absence, by themselves and their ministers, IN ALL the lands, lordships, possessions, and fees aforesaid, should make and have the assay, amendment, and assize of bread, wine, and beer, and all other victuals whatsoever, and of measures and weights, and other things which to the office of clerk of the market of the household of the said king, and his heirs, might belong, with the punishment thereof, and to do and exercise whatsoever should pertain to the same, as often as, and when it should be needful and necessary, as fully as the same clerk of the market of the household of the said lord the king, and his heirs, might or ought to do, in the presence of the said late king, or his heirs, and in his and their absence: and that they should have the amerciaments, fines, and other profits thereof, arising or to be received and levied by them, and their ministers, without the impeachment of the said king, or his heirs, or of the ministers whomsoever of him, and his heirs, so that the aforesaid clerk of the market of the household of the said king, or his heirs, should not enter the lands, lordships, possessions, and fees aforesaid, to do or exercise any thing there which to his office might, in anywise howsoever, belong. *And the same king granted to the said archbishop, and his successors, that those his aforesaid letters to them thereof generally made, should be of the same force, virtue, and effect, as if all other the things above specified had been more especially, lawfully, and particularly expressed and specified in the same letters; and that they should be read, understood, adjudged, and determined on the part of the same archbishop, and his successors, AGAINST THE SAID KING AND HIS HEIRS, as better it might be known and understood, NOTWITHSTANDING ANY omission, defect, negligence, REPUGNANCE, AND CONTRARIETY IN THE SAME, or any act, ordinance, statute, or restriction to the contrary passed; or although;*

felonies were committed, and that it appears, by a certain record had and noted before the Barons of this

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in the same letters patent, no express mention was made of the true yearly value of the liberties, franchises, acquittances, and immunities therein contained, or of any lands and tenements, or grants of liberties or acquittances to the said archbishop, and his successors, or to any of his predecessors, by the same king, or any of his progenitors, theretofore made, notwithstanding. Wherefore the same king willed and firmly commanded for him, and his heirs, that the aforesaid archbishop, and his successors, archbishops of the place aforesaid, for ever, should have all the liberties, franchises, and acquittances aforesaid, and the same and every of them should thereafter fully enjoy and use as aforesaid, without fine or fee, to the use of the said king, therefore in anywise howsoever to be made or paid, as by the aforesaid letters patent exemplified, &c. more fully appears; and by virtue of which letters patent by the aforesaid late King *Edward* the 4th, made to the aforesaid *Thomas*, then archbishop of *Canterbury* (the same archbishop then being seised of the aforesaid manor of *Harrow*, otherwise, &c. in the said county of *Middlesex*, and of the several other letters patent aforesaid, the same archbishop was also seised of the aforesaid liberties, privileges, franchises, and immunities, of, in, and upon the aforesaid manor of *Harrow*, as of fee and right, and he and his successors, archbishops of *Canterbury*, had held and enjoyed all and singular the liberties, privileges, immunities, and pre-eminences, in and by the aforesaid letters patent granted, in and upon the aforesaid manor of *Harrow*, from the time of making of the aforesaid letters patent, to and until the 12th day of *November*, in the 37th year of the reign of the late King *Henry* the 8th; at which day *Thomas*, then archbishop of *Canterbury*, primate, &c. by his deed, bearing date the same 12th day of *November*, for certain causes and considerations, him the said archbishop thereunto moving, gave, granted, and confirmed to the aforesaid *Henry* the 8th (amongst others) the aforesaid manor of *Harrow*, with its rights, members, and appurtenances; and also all and singular messuages, grange, &c. &c. (general words), to have, hold, and enjoy the manor aforesaid, with the appurtenances, to the aforesaid Lord King *Henry* the 8th, his heirs and successors, for ever, to the proper use and behoof of the same

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this Court, in the common business of this Court, amongst the records of *Trinity Term*, in the fifty-fourth

same lord the king, his heirs and successors, for ever, as by the aforesaid deed, enrolled in the Court of Augmentation of the Revenues of the Crown appears. (It then recites the confirmation by the Dean and Chapter.)—By virtue of which charter and confirmation, the aforesaid late King *Henry* the 8th was seised of the aforesaid manor of *Harrow*, with the appurtenances in his demesne, as of fee, in right of his crown of *England*; and being so thereof seised, by his letters patent under the great seal of *England*, bearing date at *Huspton Court*, the 5th day of *January* (an. reg. 37), as well in consideration of the good, true, faithful, and acceptable services to him, thencefore frequently bestowed and rendered by his well-beloved and faithful counsellor, Sir *Edward North*, then knight and chancellor of his Court of Augmentation of the Revenues of his Crown, as for the sum of 7,387*l.* 6*s.* 8*d.* of lawful money of *England*, to the proper hands of the same king well and truly paid; and for the sum of 500 marks, by the same *Edward*, by the appointment and consent of the said lord the king, to the then Reverend Father in Christ, *Thomas*, by divine permission then archbishop of *Canterbury*, primate of all *England*, and metropolitan, in hand, well and truly likewise paid, OF HIS SPECIAL GRACE, AND OF HIS CERTAIN KNOWLEDGE AND MERE MOTION, by the same letters patent, gave and granted to the aforesaid Sir *Edward North*, and the Lady *Alice* his wife (amongst others), all that his manor of *Harrow*, with all its rights, members, and appurtenances, late parcel of the lands, possessions, revenues, and hereditaments of the said archbishopric of *Canterbury*; and also free warren, free chase, and free conduct of deer, and wild beasts; and all and singular messuages, mills, tofts, cottages, houses, edifices, lands, tenements, meadows, feedings, pastures, woods, underwoods, rents, reversions, services, courts leet, and views of frankpledge, and other rights, FRANCHISES, LIBERTIES, privileges, profits, commodities, possessions, hereditaments, and emoluments whatsoever, with all and singular their rights and appurtenances IN *Harrow*, to the said archbishop of *Canterbury*, or to the said archbishopric of *Canterbury* formerly belonging and appertaining, or as being parcel of the lands, tenements, possessions, and revenues of the same archbishopric of *Canterbury* THENCEFORE had,

fourth year of the reign of his said present Majesty, upon the roll on the Treasurer's Remembrancer's

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*had, acknowledged, accepted, used, or reputed, and which the same late king held to him, and his heirs and successors, for ever, of the gift and grant of the said archbishop: to have, hold, and enjoy the said manor (amongst others), and other the premises, with the appurtenances, to the aforesaid Sir Edward North, Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, for ever, to the only proper use and behoof of the said Edward, and the Lady Alice his wife, and the heirs and assigns of the said Edward, for ever: To hold of the same lord the king, his heirs and successors in chief, by the service of the twentieth part of a knight's fee, and rendering therefore yearly to the same late King Henry, his heirs and successors, of and for the aforesaid manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill, and for Seymour Park, 11l. 1s. 6½d. at the Court of Augmentation of the Revenue of the Crown of the same lord the king, payable at the feast of St. Michael the archangel, every year, for all rents, services, and demands whatsoever for the same, to the said king, his heirs and successors, in anywise howsoever to be rendered, paid, or done. And further, the same lord the king, of his certain knowledge and mere motion, did, for him, his heirs and successors, by the aforesaid letters patent, grant to the aforesaid Sir Edward North, Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, that the same Edward, and Lady Alice his wife, and the heirs and assigns of the said Edward, should have, hold, and enjoy, and might and should be able to have, hold, and enjoy, WITHIN the aforesaid manor, messuages, lands, tenements, and all and singular other the premises, and within every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, and all things which to free warren belong; and also goods and chattels waived, estrays, assay and assize of bread, wine and beer, and goods and chattels of felons and fugitives, and felons of themselves, and otherwise howsoever condemned, or put in exigent; and also so many, such, the same, the like, and such sort of courts leet, views of frankpledge, and all things which to court leet and view of frankpledge belong, or thereafter might or ought to belong, feasts, markets, tolls, customs, fairs, gersumes, fines, amer-
 ciaments,*

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brancer's side, that they, the said *Francis Capper*, and *Elizabeth* his wife, in right of the said *Elizabeth*

ciaments, assize and assay of bread, wine and beer, free warrens, and all things which to free warren belong, goods and chattels waived, goods and chattels of felons and fugitives, felons of themselves, and others outlawed, or otherwise howsoever condemned or convicted, deodands, estrays, and other rights, jurisdictions, privileges, FRANCHISES, LIBERTIES, emoluments, commodities, profits, and hereditaments whatsoever; as and which the said *Thomas*, late archbishop of Canterbury, or either or any of his predecessors, archbishops of Canterbury, in right of the archbishopric of Canterbury, or any other or others the said premises, or any part thereof, thencefore having, possessing, or being seized thereof, ever had, held, and enjoyed, IN THE MANOR AND PREMISES AFORESAID, by reason or pretext of ANY charter of gift, grant, or confirmation, or of ANY letters patent by the said king, or either of his progenitors, to the aforesaid archbishop, or to either of his predecessors, made, granted, or confirmed, or by reason of any lawful prescription, use, or custom, by the said archbishop, OR ANY OF HIS PREDECESSORS, thencefore had or enjoyed. Then the defendants on that record derived title by mesne conveyances, from the persons claiming under the original grantee, alleging that they were thereby still possessed thereof, for the residue of the said term of sixty years, by right of accruer; and that so thereof being possessed, and the aforesaid *Edward Palmer*, and *Alice* his wife, so as aforesaid being seized of the reversion of the manor aforesaid, with the appurtenances, and of the ~~manors~~ privileges, and FRANCHISES aforesaid, within the said manor, and by their attorney aforesaid—prayed, that by the grace of the Court, all and singular the aforesaid fines, issues, and amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments whatsoever by them, in form aforesaid, claimed within the said manor of *Harrow*, otherwise *Harrow upon the Hill*, otherwise *Sudbury*, with the appurtenances, and the members of the same manor, according to the tenor of their aforesaid charter, they might be allowed to have, use, enjoy, and exercise within the manor aforesaid; and day being given till, &c. when the then Attorney General confessed their claim, and the premises being seen by the Barons mature deliberation between them had, it was considered that the aforesaid *Joseph Herne*,

zabeth and Frances Pierson, on the said 30th day of *May*, in the fifty-second year of the reign of his said present Majesty, the day on which the said felonies were committed, and long before, and from thenceforth down to and on the said 1st day of *July*, in the fifty-second year of the reign of his said Majesty, on which day the said *Thomas Bowler* was convicted and attainted of the felonies aforesaid, and from thenceforth, down to and in the said *Trinity Term*, in the fifty-fourth year, &c. claimed to be, and were seised of the manor of *Harrow*, otherwise, &c. with the appurtenances in their demesne, as of fee, and also claimed to be, and were seised, as of fee and right, of and in the aforesaid fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments; and upon the confession of Sir *William Garrow*, Knt. his Majesty's Attorney General, it was considered by the Barons of this Exchequer, that the aforesaid fines, issues, amerciaments, forfeitures, penalties, franchises, pre-eminences, profits, commodities, and hereditaments, should be adjudged unto the said *Francis Capper*, and *Elizabeth* his wife, in right of the said

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Herne, Thomas Davies, Edward Palmer, Esq. and Alice his wife, had, within the manor of *Harrow*, all and singular the aforesaid fines, issues, amerciaments, forfeitures, penalties, LIBERTIES, FRANCHISES, pre-eminences, profits, commodities, and hereditaments whatsoever, by them in form aforesaid claimed, according to the tenor of the charters aforesaid, to be used, enjoyed, and exercised, within the manor aforesaid, by pretext of the premises. Saving always the right of the lord the king, if, &c. prout patet, &c.

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said *Elizabeth*, and the said *Frances Pierson*, according to their said claim, as by the said last-mentioned record, now remaining in this Court as aforesaid, may more fully appear.

And the said defendants further said, that they, the said *Francis Capper*, and *Elizabeth* his wife, in right of the said *Elizabeth* and *Frances Pierson*, had, ever since the said *Trinity* Term, in the fifty-fourth year, &c. and the allowance of their said claim, been and still were seised of the aforesaid manor of *Harrow*, &c. with the appurtenances in their demesne, as of fee, and of the fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments aforesaid, as of fee and right.

And the defendants further said, that the said *Thomas Bowler*, on the said 30th day of *May*, in the fifty-second year of, &c. being the day on which the said felonies were committed, and since, until, and at the time of his conviction and attainder, as before and hereinafter mentioned, was a tenant of the said manor of *Harrow*, and also a resident within the said manor, and the precincts of the same, to wit, at *Westminster*, in the county of *Middlesex*. And the defendants further said, that they, the said *Francis Capper*, and *Elizabeth* his wife, in right of the said *Elizabeth*; and the said *Frances Pierson* being so seised of the said manor of *Harrow*, &c. with the appurtenances, and of the fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits,

fits, commodities, and hereditaments aforesaid, and the said Thomas Bowler being so a tenant of the said manor, and resiant within the same manor, and the precincts of the same, the said Thomas Bowler, of the aforesaid felonies by him committed and perpetrated, according to the law and custom of this realm, was lawfully convicted and attainted, as by the aforesaid record thereof appears.

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And the defendants further said, that the said *Thomas Bowler*, on the said 1st day of *July*, in the fifty-second year, &c. being the day on which he was convicted and attainted as aforesaid, was possessed of and entitled unto all and singular the aforesaid *residues of terms of years, ANNUITIES, goods and chattels, and sums of money aforesaid, in the aforesaid inquisition, and the schedule thereunto annexed contained, in his own right, and of his own proper goods and chattels, and property; and that the said lands, situate at Apperton aforesaid, wherein the said Thomas Bowler was possessed of the residue of a term for twenty-one years, as in the said inquisition mentioned, were and are situate within the said manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill; and that the said indentures of lease of the said several terms for years in the said inquisition mentioned, were, on the said 1st day of July, within the said manor, and the precincts thereof; and further, that all the said goods and chattels in the said schedule specified, were, on the day and year last aforesaid, within the said manor,*
and

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and the precincts thereof, to wit, at Westminster aforesaid, in the county aforesaid.

And the said *Francis Capper*, and *Elizabeth* his wife, in right of the said *Elizabeth* and *Frances Pierson*, all the aforesaid *residues and terms of years, annuities, goods and chattels*, and sums of money, in the aforesaid inquisition, and the schedule thereunto annexed contained, by virtue of the premises, claimed to belong to them, and that they have, and of right ought to have and enjoy the same.—*Parati verificare.*

Wherefore they humbly hoped, that his said present Majesty would not hinder or molest them therein any further, of or in the premises; and they demanded judgment, that the hands of his said present Majesty, from his possession of the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said *Thomas Bowler*, late convicted and attainted of felony, and in the hands of the said (commissioners), so as aforesaid remaining, might be amoved: and that the said (commissioners), of the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said *Thomas Bowler* at the time of the said conviction and attainder, and every part and parcel thereof, against his said present Majesty, his heirs and successors, and every of them, might be exonerated and quieted, by reason of the premises; and that the now sheriff, and all others who may hereafter be sheriffs of the said county of *Middlesex*, might not be charged therewith; and that

that all the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said *Thomas Bowler*, late attainted of felony at the time of his said conviction and attainder, so taken and seised into the hands of his said Majesty as aforesaid, or elsewhere, within the realm of *England*, to the aforesaid *Francis Capper*, and *Elizabeth* his wife, in right of the said *Elizabeth* and *Frances Pierson*, by virtue of the premises, may be given and delivered, &c.

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REPLICATION.—Sir *Samuel Shepherd*, Knt. Attorney General of our said Lord the King, who prosecutes for our said Lord the King in this behalf, having heard the said claim of the said plaintiffs read:—as to so much thereof as relates to the said lands at *Apperton* aforesaid, wherein the said *Thomas Bowler* was possessed of the said residue of a term of twenty-one years, and to the said goods and chattels in the aforesaid inquisition, and schedule thereto annexed contained:—

to say, that he cannot deny but that the said last-mentioned lands are situate within the said manor of *Harrow*, otherwise *Sudbury*, otherwise *Harrow on the Hill*; and that the said goods and chattels are within the said manor, and the precincts thereof, in manner and form, as the said *Francis Capper*, and *Elizabeth* his wife, and *Frances Pierson*, have above alledged and pleaded. And the said Attorney General doth not deny, but confesseth the claim of the said defendants to the

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said last-mentioned lands, and the said goods and chattels; and as to the residue of the said claim, the said Attorney General, on behalf of his said Majesty, protesting that the said claim, in manner and form as the same is above made and pleaded, and the matters therein contained, are insufficient in law to amove the hands of his said Majesty from his possession of the said residues of the said terms of years, and the lands comprised therein (except the said lands at *Apperton*) annuities, and sums of money therein mentioned; and that the said Attorney General, on behalf of his said Majesty, has no occasion, nor is he bound by the law of the land to answer thereto. Nevertheless the said Attorney General, on behalf of his said Majesty, saith, that the lands comprised in the said residues of the said terms of years, (except the said lands at *Apperton*) and the said annuities and sums of money, *were not, nor are* any or either of them, *situate within* the said manor of *Harrow*, otherwise *Sudbury*, otherwise *Harrow on the Hill*, but were and are *out* of the said manor. And the said Attorney General, on behalf of his said Majesty, further saith, that in the said first year of the reign of the said King *Edward IV.* formerly King of *England*, and at the time of the making of the said letters patent of the same late King, *the then Archbishop of Canterbury was seised in his demesne as of fee, in right of his said archbishopric, as well of and in the said manor, as of and in divers other lordships and manors, in divers parts of England, wherein were divers men and tenants of the arch-*
bishop,

bishop, as well resident as non-resident, and the said archbishop, and his successors, archbishops of Canterbury, and the said Thomas, archbishop of Canterbury, in the said claim mentioned, continually from the making of the said letters patent of the said King Edward IV. until and at the time of the making of the said deed by the said Thomas, archbishop of Canterbury, bearing date the 12th day of November, in the thirty-seventh year of the reign of the late King Henry VIII. were seised in their demesne as of fee, in right of the said archbishopric, as well of and in the said manor of Harrow, otherwise Sudbury, otherwise Harrow on the Hill, as of and in the same other lordships and manors, wherein, during all the time aforesaid, were divers men and tenants of the same archbishops, as well resident as non-resident, and also of and in the several liberties, privileges, and franchises, granted by the said letters patent of the said late King Edward IV.; and that the said Thomas, archbishop of Canterbury, and his successors, archbishops of Canterbury, from the time of the making of the said deed, continually have been, and the now Lord Archbishop of Canterbury still is seised in their and his demesne, as of fee, in right of the said archbishopric, of and in divers of the other lordships and manors, wherein there were and are divers men and tenants of the same archbishops, as well resident as non-resident, to wit, at Westminster, in the county of Middlesex; and this the said Attorney General, on behalf of his said Majesty, is ready to verify. Wherefore he prays

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judgment, and that the said lands comprised in the said residues of the said terms of years (except the said lands at *Apperton*), and the said annuities and sums of money, may remain in the hands of our said lord the king.

Demurrer—and Joinder.

Parke, for the demurrer, submitted, that the real questions would be, 1st, whether the leasehold property of *Bowler*, situate *without* the manor, passed by the operation of the two grants taken together: and, 2dly, whether the stock and *money in the funds*, the property of the felon, passed by those grants, or either of them.

On the first question he contended, that it having been admitted on the record that the defendants were entitled to the tenants goods and chattels within the manor, it was admitted, that a royal franchise passed by the letters patent to the grantee; for unless a liberty had been granted, they would have had no right to any thing.

[It was admitted that the leasehold property would pass under the words of the grant.]

He then insisted that the terms of the grants were general, large, and unconfined, and there was nothing expressed in them by which their construction could be so limited as the crown were obliged to contend it must be:—that there could be no doubt that by the first grant of *Edward IV.* to the
archbishop

archbishop every thing personal which the tenant attainted had, wherever situate locally, passed to the grantee. On that point he submitted there was to be found an authority which was precisely applicable and went to establish the whole proposition: and that was Lord *Lumley's* case (a):—a case decided with more than ordinary solemnity; being said to have been resolved by all the judges of *England*. The king (in that case) granted to the Earl of *Arundel* and his heirs '*ex gratiâ speciali certâ scientiâ & mero motu omnia bona & catalla felonum & felon' de se attinct' de proditiõne, de felonid, utlagatorum in exigendo positor', hominum suorum, integre tenentium, & non integre tenentium, residentium, & non residentium DE ET IN omnibus maneriis & hereditamentis dicti comitis.*' The earl was seised in fee of the hundred of *Paling*, in the county of *Sussex*. *B.* held a tenancy in fee within the said hundred of the said earl, as of his person. *B.* was attainted of treason, committed by him in the county of *Hereford*, and had a lease for years, and goods within the said hundred of *Paling*, and elsewhere, *where the earl had not any hereditament*: Resolved by *all the judges of England*, that the Lord *Lumley*, who has the estate of the Earl of *Arundel*, shall by force of the said patent have the said tenancy, lease, and goods.

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The case then proceeds:—'The word "*de*" shall be construed and relate to any tenure of the per-

(a) Jenk. Rep. 6th Cent. case 47.—and Vin. Abr. 134.

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son, or of any manor of the earl: the word "*in*" relates to goods; the word "*de*" to tenancies which are held of the earl be the tenants resident or non-resident. This is a good precedent to construe *beneficium principis, quod decet esse mansurum*. The words in a patent *ex certâ scientiâ speciali gratiâ & mero motu*, make the case of the king like the case of the grant of one subject to another; if the king be not evidently deceived.'

That case goes the whole length of the proposition for which the defendants contend, and if it be an authority at all, is directly in point, at least as to the grant of *Edward IV.*

Then the question will be, whether that grant is not embodied, and the whole substance of it incorporated in the grant of *Henry VIII.* to Sir *Edward North*. The latter grant adopts the former in the fullest and most ample terms, and by express and most comprehensive reference to it grants all the privileges, *liberties*, franchises, &c. &c. which the archbishop had. Now the cases are numerous which establish that words of express reference to a former charter, person, or thing, will pass the franchises which had been appendant to the subject-matter before its reunion to the crown. This is the case of a *liberty*—a *royal franchise*—and therefore passes by words of reference. In *Whistler's* case (*b*) it was held (citing *Darcie's* case), that 'if a

(b) 10 Rep. 65 (b).

man has a manor to which an advowson is appendant, and franchise to have forfeitures and other franchises within the manor, and afterwards the manor comes to the king by forfeiture of war, and afterwards the king gives the manor to hold with the franchises which were always regardant to the said manor as such a one held, he shall have the franchises: and there Sir *William Herle* said, that it shall be a new grant; for the franchises (which lay in point of charter) were come to the crown.' And in the same case it is said to be observable thereon, 'that if a manor, in which the owner have franchises which lie in point of charter, as forfeitures for treason, and other royal franchises, come to the king's hands, and he grants it again with the forfeitures of treason and other franchises which were regardant or appertaining to the said manor, as such a one held, all the franchises should pass, and that the words "regardant or appertaining to the manor" shall be taken in that sense, although according to the strict propriety of the words such franchises could not be appertaining to the manor.' And the reason given is, that such construction as will make the true intention of the king expressed in his charter take effect is for the king's honor, and stands with the rules of law: and therefore this word "appertaining" shall in such case in the king's grant be taken out of the proper signification. The case then proceeds thus:—2. 'It is to be observed, that in the same case such franchises as *be in point of charter* shall pass *as by a new grant*; *à fortiori*, franchises appendant or appertaining to a manor,

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as advowsons, &c. (which always continue *in esse*, and are never extinct in the crown) shall pass. It is said in *Plow. Com.* in *Fogassa's* case, 12. b. if the king at this day grants over certain lands which have come to his hands before, and further grants to the grantee *tales libertates, privilegia, jurisdictiones*, &c. that he had who was last seised of the lands, where the king knows not the certainty of the liberties and privileges, yet the grant is good enough, and the patentee may enquire what liberties and privileges the other had before; and forasmuch as this incertainty may be reduced to a certainty by enquiry or circumstance, the grant is good'. (citing 9 Rep. f. 24. b.) That case is noticed for the same point in *Viner* (c), where also under the same title (pl. 1.) it is said (citing *Br. Abr. Tit. Extinguishment*, pl. 32, and *Ib. Incidents*, pl. 12), if the king purchases a manor to which franchises real (*royal*) are regardant, and after gives the manor *simul cum libertat' ad illud spectant'* and does not say *simul cum libertat' ad illud spectant' at the*

(c) *Abr. tit. Prerog. of the King* (I. b.) pl. 7. (L. b.) pl. 1.

* 'Thorpe dit, si le roy purchas maner' a q franchises royals sont regardats & puis done le mannor simul cū libertat' ad illud spectant', nul liberties passa, car p le purchas les franchises de cōmō droyt fuit annex' al coron', "cōtř sil dōe le maner "cum libertat' ad illud spectant' tēpore quo maneriū fuit in "manibus le ffeoffor" car ils fueront extincts devant, ut videtur & p ceux parolx ils passa cōe appēdants per luy. 43 As. p. 10.'

'*Incidents & appendants*, pl. 12.'

'Franches que fueř extinct' p purchase le roy pass' "p "novel graunt come append."

time

time that the manor was in the hands of the feoffor of the king, the franchises do not pass by this general grant, because the franchises of common right were annexed to the crown. But (it is also said, pl. 2.) otherwise it had been if special mention had been made "as is aforesaid" in the charter: and several other cases to that effect are noticed in the same book. The authorities therefore establish that point incontrovertibly: and the whole case is strengthened by the rule with respect to royal grants recognized in the books, that where the king grants by the words '*ex certa scientia & mero motu*', such patents shall be taken more strongly against the king, and in favor of the patentee. (*Vin. Abr. Tit. Prerog. (E c) 3.*) where many authorities are cited in support of that position. These patents grant by those words; and therefore *ex vi termini*, many objections which might otherwise have been raised on the distinction to be taken between the grants of the crown and those of the subject are entirely put out of this discussion.

Then (adverting more particularly to the terms of the grants, and observing that besides the very general nature of those terms, there were many things granted which were merely personal—as to have fines, amerciaments, &c. of their tenants, that they should be exempt from tolls throughout *England*, &c. &c.—which could not be confined to locality)—it was insisted, that, on the whole, it was impossible to contend that the grantees were not entitled to the goods and chattels of attainted

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tainted tenants of the manor, *wherever they might be found*, as well *without* the manor, *as within*.

On the 2d question—whether the money in the funds and stock belonging to the tenant passed by the grant—it was submitted, that the grantee was entitled to that species of property also under the words “*bona & catalla felonum*,” used in a grant of a *liberty*. It was urged, that as there could be no doubt that the crown would be entitled to such species of property, and that the grant of a *liberty* was a transfer of a complete right of sovereignty, such property must be held to have passed by this grant. In *Com. Dig. Tit. Waife*, C. it is said, that “by grant of the *goods fugitivorum & felonum*, the grantee shall have the *debts* and *specialties* of fugitives, &c. as well as other goods, though there are no special words.” In *2 Rot. Abr.* 195. (E) pl. 1. is the position, that—if the king grant certain *liberties*, and among other things *omnia bona & catalla felonum de se*, within such a place, it shall pass obligations, specialties, and debts, due to the felon; for though in other cases it would not, in the grant of a *liberty* it will. There can be no doubt that the stock would have belonged to the crown: and if a particular grant had been made, which, after reciting *Bowler’s* conviction, had granted all his goods and chattels, his stock or money in the funds would have passed. Such property is in fact an annuity, and it is personal, and declared to be so by the 41st *Geo. III. c. 3. s. 17*. It is transferrable by assignment. Annuities were known to the common law. (*Com. Dig. Tit.*

Tit. *Annuity*.) And although funded property was certainly not known when these grants were made, yet the language of the grants is prospective; the words are "of all things which to the said late king, or his heirs, *might* or ought to belong." Promissory notes, which are *choses in action*, and also of comparatively modern introduction, would have belonged to the crown; and therefore they would pass to the grantee.

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Richardson, for the crown, contended, that the defendants were not entitled to the goods and chattels of the felon not situated within the manor. If the grant of *Edward IV.* even to the archbishop could be construed so largely, it would be productive of the utmost mischief and inconvenience if it were not altogether impracticable. It would induce a continual clashing of claims between different lords, grantees of similar franchises in different manors; and between the archbishop himself and his alienee of any of his lordships, before the act restraining ecclesiastical persons from disposing of their possessions; and it would be impossible to say where one of the numerous manors of the archbishop had been granted away by him, and a tenant of that manor had been attainted, being possessed of leasehold property both in the manor granted, and in others still belonging to the archbishop, whether the property in the manor not granted belonged to the archbishop or his grantee: and he submitted that on that ground alone it could hardly be conceived that the king had granted the franchise in so large
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a manner as the defendants construe it. Such a grant in those days would have occasioned a constant warfare between the different lords, if it were so to be construed, and in more modern times unceasing litigation as the present claim sufficiently proves; and therefore it ought to be most satisfactorily shewn to be the unavoidable construction of it before the Court would so extend it: whereas the construction put on it by the crown was at once reasonable and practicable.

He then adverted to the various passages of the grant, which gave authority to the ministers and servants of the archbishop to put themselves in possession of the goods and chattels, &c. &c. (Vide the grant, *ante*, in italics *passim*) as shewing that the franchise was intended to be confined to the possessions of the archbishop, where alone his ministers and servants could have had jurisdiction.

He admitted that Lord *Lumley's* case was a strong authority, as far as it went; but he submitted, that there did not appear to have been any opposition made to the claim of Lord *Lumley*, and that it was decided without argument: and that there was also to be noticed a distinction in that case, the tenant holding the tenancy in fee of the earl "*as of his person.*"

He then insisted, that whatever might be the construction of the first grant, it was quite clear that the goods of felons without the manor did
 not

not pass to the grantee by the re-grant of *Henry VIII.*, contending that there must be express words to revive a liberty, which has become reunited to the crown, by a re-grant to a subject of the possessions to which it had been annexed; and for that he cited *Com. Dig. Tit. Grant, G. 7.* where it is said that "words too general are not sufficient in the king's grant: as if *bona felon'*, &c. which lie in grant and not in prescription, are reunited to the crown or extinguished, and afterwards the king grants the manor *cum tot tal' libertat' privileg'*, &c. *qual' A. nuper abbas habuit*, who claimed the same privileges by charter, the grantee shall not have *bona felon'* by such general words." To the same point is the Bishop of *Coventry's* case, 2 *Rol.* 193. l. 40. and Lord *Lovelace's* case, Sir *W. Jones' Rep.* In itin. *Windsor*, 270, and in itin. *de Waltham*, 349. The rule is clear that the crown is not bound by general words, or words of reference, and that in all cases of royal grant express words are necessary to confer or revive a franchise.

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[*GRAHAM, Baron*, mentioned the Marquis of *Downshire's* case*, recently determined in this Court, as having so decided.]

If it should be said that there are express words in this grant, it should be observed that there is also an express limitation of them, confining the subject-matter to the manor of *Harrow*. The words "*within the manor of Harrow*" govern and qualify every one of the several objects of

* A report of that decision immediately follows this case.

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the grant, and the grant itself commences and concludes with those words. The Court is therefore relieved from the necessity of construing the grant in a manner so inconvenient and incongruous as the construction attempted to be put on it by the defendants would be, if indeed they could so construe it on the general tenor of the grant independently of the presence of those words.

He submitted therefore finally, that the defendants construction was not the true and legal one, as applied to either of the grants; but that as applied to the grant of *Henry VIII.* the very terms of the letters patent exclude the possibility of such a construction, and are conclusive against it.

As to the question of the stock, he contended, that the general words of the letters patent were not sufficient to pass money in the funds, of whatever nature such sort of property might be deemed to be; and he submitted that it certainly was not personal property. Cases have established that the debts of a felon do not pass by general words: and particularly *The King v. Sutton* (d); *The Mayor of Southampton v. Richards* (e); *Ford and Sheldon's case* (f); *The Queen v. The Archbishop of Canterbury* (g), which last was a case where the question was, whether a right to a presentment on an avoidance passed by a grant of goods and chattels of felons of themselves; and it seemed to be the prevailing opinion (for the case was not deter-

(d) 1 Wms.'s Saund. 275.

(f) 12 Rep. 162 a.

(e) 1 Sid. 142.

(g) 1 Leon. 202.

mined)

mined) that a title to present being a special chattel, did not pass by the general words "goods and chattels." He also cited an *Anonymous* case in *Owen* (h); *Lord Northampton v. St. John* (i); and an *Anonymous* case in *Ventr.* (k) Then advertng to the case cited for the defendant from 2 *Rol. Abr.* 195, he objected that that was not in point of fact a decision: the report states merely that "so the judges seemed to incline," and eventually they recommended a trial, the result of which is not known.

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But it was chiefly urged, that in all events, as the money in the funds, be it annuity or what it may, was not locally situate within the manor of *Harrow*, it therefore did not pass. It has no locality: it is *bona notabilia*, and requires prerogative administration. It is difficult to define what species of property stock is. It was certainly made personal by act of parliament (41 *Geo.* III. c. 3.) for purposes of enjoyment; but the intrinsic nature of the property was not nor could be altered by that statute: and in construing a grant of the date of these letters patent, that act of parliament can not certainly be called in aid to extend its effect, by including a species of property not in existence at that time. In the case of *Wildman v. Wildman* (l), the Master of the Rolls held, that stock was merely a right to recover a perpetual annuity, and that it was neither a chattel nor had any resemblance to a personal chattel. On the whole

(h) *Ow. Rep.* 155.

(k) 1 *Vent.* 32.

(i) 2 *Leon.* 56.

(l) 9 *Ves.* 117.

therefore

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therefore he submitted, that that species of property did not pass by the grant of goods and chattels of felons, or that if it did, as it was confined to goods, &c. within the manor of *Harrow*, stock being not in fact locally situate any where, and certainly not within the manor, clearly did not pass by the words of the second grant.

Parke, in reply, submitted that whatever might be the inconvenience arising from any number of sub-grants made by the original grantee, no question of that sort occurred in the present case, and therefore no argument could be founded on it now. He insisted that the cases cited for the defendants were in point, and had not been answered; and as to the cases brought forward for the crown, he relied on the distinction before taken of the present being a grant of a *liberty*.

He repeated that the money in the funds passed to the defendant under the words "goods and chattels," and submitted that the case from *Siderfin*, of *The Mayor of Southampton v. Richards*, on which *The King v. Sutton* seemed to have been founded, had in fact decided nothing, nor had there been any decision in the case from *Leonard*, of *The Queen v. The Archbishop of Canterbury*. The present was therefore a case of first impression, and depended materially on the nature of such property, and whether it was capable of being included and granted under the words "goods" and "chattels."

Cur. Adv. vult.

RICHARDS,

RICHARDS, *Lord Chief Baron*, now delivered judgment.

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[Having stated the facts and the pleadings elaborately and succinctly from the record: and having observed, that—it being admitted by the confession of the Attorney General in his replication, that the defendants were entitled to the residues of terms, goods, and chattels, situate and being locally *within* the manor of *Harrow*, of such of the tenants of the manor as should be attainted of felony—the sole question would be, whether they were also entitled to the residues of terms, and goods and chattels of such tenants, situate and being locally *without* the manor.] That question, said his Lordship, will depend wholly on the legal construction of the two grants by which the franchise is said to have been conferred.

The first is a grant of *Edward IV.* of certain privileges therein enumerated to the then archbishop, to be enjoyed by him and his tenants *in, of, or upon* the lands, lordships, possessions, and fees of the said archbishop.

[His Lordship, having read *verbatim* the granting part of those letters patent, as far as the conclusion of what relates to the franchise of having the goods and chattels of felons, observed,]

There is nothing said of the manor of *Harrow* by name in that grant, as distinguished from the other possessions of the archbishop, and it appears

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from the record (on which I shall presently observe) that the archbishops of that day possessed many other manors besides this of *Harro*w in different parts of *England*. The grant is a very general one, and is worded in a very general way, and certainly in its terms it is very indefinite and confused, and most inconvenient of construction.

In the 37th of *Henry VIII.* the then archbishop granted this manor of *Harro*w to king *Henry VIII.* and there is no doubt that by that grant the king became seised of the manor *de jure coronæ*, as amply as if it had never been granted at all to a subject.

The king then (in the same year) granted it to Sir *Edward North*, and it will be extremely material in deciding this case to attend particularly to the precise terms of this last grant.

[His Lordship read the words, as in the note, p. 230-1, to the *habendum*.] He granted therefore, as we see, all this manor of *Harro*w, with all and singular its rights and appurtenances IN *Harro*w expressly and emphatically, to the said archbishop of *Canterbury* formerly belonging. Nothing is here, as yet, said about the goods of felons, and whatever is given is stated to be in *Harro*w. Then the grant thus proceeds: "And further the same lord the king of his certain knowledge and mere motion did grant to the aforesaid Sir *Edward North* and the Lady *Alice* his wife, that they should have, hold, and

and enjoy, *within* the aforesaid manor, messuages, &c. and all and singular other the premises, and *within* every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, &c. &c.; and goods and chattels of felons and fugitives, and felons of themselves, outlawed or otherwise, and others howsoever condemned, or convicted, deodands, estrays, and other rights, jurisdictions, privileges, franchises, liberties, &c. as or which the said *Thomas*, late archbishop of *Canterbury*, or either or any of his predecessors, in right of the archbishopric, ever had, held, and enjoyed *in the manor and premises aforesaid*, by reason or pretext of any charter of gift, &c." That is the language of this second grant to Sir *Edward North*. The defendants in their plea deduce their title from that grantee. Now the first question is, whether under that second grant the leasehold property of tenants of the manor, *not locally situate within the manor*, passed from the crown to the grantee; for the Attorney General has very properly confessed the defendant's claim, *as to those parts which are locally situate within the manor*.

Now I very much question whether the leasehold premises of the tenants of the archbishop, situate *out of* the manor, would have passed even by the terms of the first grant of *Edward IV.* to the archbishop, large and extensive as they are said to be; yet certainly, as applied to this question, those letters patent are very difficult of interpretation.

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pretation. But a fact is put on the record by the replication of the Attorney General, which will much assist us in ascertaining the true construction of these instruments. It is, that "the archbishops of *Canterbury* before and at the time of making the letters patent of *Edward IV.* and from thence till the time of the grant from the then archbishop to King *Henry VIII.* were seised in their demesne as of fee, in right of the archbishopric, as well of and in the said manor of Harrow, as of and in divers other lordships and manors in divers parts of England, wherein were divers men and tenants of the archbishops, as well residents as non-residents," and that fact may serve to account for the otherwise apparently extraordinary terms of the grant, on which the defendants put so extensive a construction; and under which they insist that every thing which belonged to every tenant of the manor, in any place, and wherever situate, became forfeited on attainder, to the archbishop. Now certainly that would be a most inconvenient construction, and would be productive of much mischief if it were to be supposed that the king should make such a grant to any person who was possessed of other manors, without confining it to the possessions of the grantee; for each of those manors might be aliened to other different persons as the manor of *Harrow* was to the king, and in that case each individual alienee would have claims so incompatible as to render the grant altogether absurd in effect, and impracticable of enjoyment, if it were necessarily to be construed as the defendants

ants contend, *reddendo singula singulis*, whereas there might be somewhat more of consistency in such a grant, if taken to be personally confined to the proprietor of many manors, giving him such a right commensurate in extent with his other possessions. In any other point of view the construction now attempted to be set up would so abound with inconveniences and inconsistencies, that unless we should be absolutely driven to adopt it, it ought to be at once rejected.

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In such a case therefore the *onus* is on the defendants. Now they profess to sustain that *onus* by an authority, which they insist is decisively in their favor. I have been favored with a copy of the record, but I think I may fairly state it from the book in which it is reported: that is Lord *Lumley's* case.

[His Lordship read the case.]

Now it does not strike me, that that case is exactly in point here, even as applicable to the first grant, so as to establish the defendants' position; for the words, and the form of the grant in Lord *Lumley's* case, are not precisely the same as in these letters patent\*. But with respect to its being  
conclusive

\* It may be useful to make one short observation, as to the distinction in the language. In the case cited, the words are 'DE & in.' In this grant the words are 'IN, of, or upon,' the one making the more comprehensive and *personal* preposition 'de' the leading term, and uniting it with the more limited and *local* one 'in,' by conjunction (purporting  
s 3 addition)

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conclusive or applicable to that proposition as to the second grant, I think it is quite clear that it has no application whatever to that, and therefore we need not discuss its bearing on the first letters patent.

There can be no doubt that *Henry VIII.* took the manor as fully as the king had it before the original grants. The cases are numerous which establish that; but I shall content myself with only stating one or two. In the case of *The Abbot of Strata Marcella (m)* it is said, 'when the king grants any privileges, liberties, franchises, &c. which were such in his own hands as parcel of the flowers of the crown, as *bona & catalla felonum*, &c. within such possessions: if they come again to the king, they are merged in the crown, and he has them again in *jure coronæ*.' That position is maintained in *Comyn's Digest* (Tit. *Franchises*, G. 1.) where authorities are collected which establish that franchises appendant to a manor, or other possessions become extinct by their re-union to the crown, and the king is then again seised of them in *jure coronæ*.

That being so, the rule is, that where liberties are extinct, they cannot be created *de novo* by

addition)—the other giving the commanding position to '*in*,' and employing the disjunctive, making '*of*' rather synonymous with '*upon*,' than distinct from '*in*' and '*upon*,' as if intended to be used merely to explain, and not to add to the leading term.

(*m*) 9 Rep. 25. *b*.

general

general words. There are one or two strong decisions to that effect in *Viner*; and I have looked into the cases themselves, and find them perfectly correct. The first is in Tit. '*Prerogative of the King*,' (A. c.) 'The dean and chapter of *P.* being seised of certain manors, to which the king annexed by grant that they should be discharged of purveyors. They surrendered the manors to the king. The king afterwards granted them to others, with the same liberties and privileges as the dean and chapter had. In that case, in as much as the ancient liberties were extinct, by being sunk into the crown, such general grant did not create *de novo* the liberties which the dean and chapter had before.' In another case, in the same book, Tit. *Prerogative* (A. c.) 2. 'The Bishop of *Coventry* had a liberty *de catallis felonum* within his manor of *B.* and the manor having come to the king by attainder, he granted it over with *tot tales tantas & quales libertates*, as the bishop or his predecessors had: yet it was held, that the grantee should not have by that grant the said liberties which the bishop had; for when they are once extinct, words of revivor will not be sufficient; but there ought to be words of grant: and such general grant will not be sufficient.' In Lord *Paget's* case also (n) it was held, that general words are not sufficient in the king's grant. Thus, where a grant was of *bona & catalla felonum* in a particular forest by *H. VI.* to *J. S.* Afterwards, by a private statute,

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(n) Cited in Lord *Darcie's* case, Cro. Eliz. 513.

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all liberties granted by him were resumed. The forest came to the king by attainder, and it was again granted over with all the liberties which *J. S.* had therein with a *non obstante aliquo statuto*; yet it was held, that the grantee should not have *bona felonum* by such general words: and there are many other cases to the same effect. I will only add that of *The King v. Sutton (o)*, where, on a grant of *bona & catalla felonum*, it was held, that the goods and chattels of felons of themselves do not pass.

[His Lordship again adverted particularly to the terms of the grant of *Henry VIII.*] It is admitted that by this grant the goods and chattels of felons, situated *within* the manor, passed; but the defendants claim all the tenants goods, &c. wherever situate. Now that as I have said would be a most inconvenient grant if it were to be so construed; but I consider that it is impossible to give so extensive a construction to that grant, even if it were not a grant of the crown, but of a private individual; for by the grant of a private person, of the goods and chattels of felons *within* a place, the goods and chattels of felons out of that place would clearly not pass. I, however, by no means intend to admit, by so saying, that the grants of the crown are to be construed as those of private persons are; for they are not governed by the same principles. It has been urged, that the words *ex mero motu & certâ scientiâ (p)*, reduce a royal grant to the

(o) 1 Saund. 273.

(p) Vide *Sawyer v. East, Lane Rep.* 111.

same

same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor, and certainly those words are here. I am however not of that opinion, and although cases to that effect may be found, yet they will not bear minute investigation, when the principles on which they proceed are examined. Then, when it is contended, that the words of reference to the former grant carry it further, the cases, which I have already adverted to, furnish the answer to that proposition.

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Thus the defendants having no claim on principle, and there being many authorities against them, we are to enquire if there be any case which favors the doctrine on which they rely. I consider the only authority cited for them which even appears to incline towards it, (Lord *Lumley's* case,) as by no means in point, or applicable; for the words in that grant are *bona (&c.) tenentium (&c.) de & in omnibus maneriis, &c. dicti comitis*, so that that grant is extended expressly to tenants holding *of* the manor, as well as tenants *within* the manor; whereas in this second grant there is a total absence of *de*, and a constant presence of the preposition *in*. The words within the manor are on each occasion repeated as if with care, at the commencement, throughout, and at the end. That case being therefore out of the way, there is no authority for the arguments which have been used on behalf of the defendants' claim,

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claim, and there must accordingly be judgment for the crown on that part of the case.

The next question is as to the stock and the dividends. Now it is certainly not easy to define precisely the meaning of "stock." It is not an ancient subject of property, nor known to the common law. It is however a hereditament. It is an annuity, and treated as such by act of parliament, and it is made personal estate by statute. But whatever it may be after our decision on the other part of the case, the only question regarding it now, is where such estate is to be considered as locally situate. It does not lie within the manor of *Harrow* clearly, nor is there any precise defined locality ascribable to it. For some purposes however it has a locality, as certain specialties have. One of those purposes is that of probate and administration, for giving effect to which it is supposed to lie within the archbishopric of *Canterbury*. Now *Harrow* is not within that archbishopric. It cannot therefore in any sense be said to lie within the manor of *Harrow*, even if it have a fixed locality; and if it have not, *cadit questio*, for nothing is granted that is not within the manor of *Harrow*.

The case of *Wildman v. Wildman* (q), which was decided by the then Master of the Rolls, whose accuracy we all well know, is applicable to this

(q) 9 Ves. 177.

point.

point. The question there was, whether stock which a wife had become entitled to as next of kin to an intestate in the life-time of her husband, part of which she had transferred with his consent, belonged to her after his death. She had received the dividends whilst he was living. The Master of the Rolls was of opinion that it did belong to her by survivorship. We know that a chair or a horse would not, but that a debt or a legacy would. On that occasion his Honor said, "The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption—a mere right therefore: the circumstance that government is the debtor (so that he considered it a debt) can make no difference—a mere demand of the dividends as they become due having no resemblance to a chattel moveable, or coined money, capable of possession, and manual apprehension." Thus he seems to have thought, and I apprehend correctly; that such a chattel as is capable of reduction into possession by a husband, so as to give it to him, must be such as may be possessed by manual occupation. And on that ground he decided, that a transfer of stock to the wife, was not a reducing into possession by the husband, so as to destroy its legal incident of surviving to the wife.

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Then it has been held, that the words *bona & catalla* in a royal grant will not pass the debts of a felon. The authorities for that are *Ford* and *Sheldon's* case (r), and *The King v. Sutton* (s). In

(r) 12 Co. 1, 2.

(s) 1 Saund. 273.

the

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the first of those cases it is laid down that a grant of such things extends only to goods in possession, and not to things in action. Now stock cannot be called a thing in possession: it is a thing in action.

There is also another case which is very strong on the same point, because it goes to shew that the words "goods and chattels" will not carry a debt as being a *chose in action* even in a will, where there are not other words plainly importing an intention that they should pass; for I by no means say that it would not pass *choses in action* in a will in any case. We are now however upon the construction of legal instruments which require great care, notwithstanding any liberality which the words *ex certâ scientiâ & mero motu* may be supposed to admit of. The case I allude to is that of *Chapman v. Hart (t)*, which was a bequest of all the testator's goods and chattels in his house, and on board the *Warwick*. On that Lord *Hardwicke* said, "Undoubtedly no goods and chattels in the house can pass but such as were properly in possession, not *choses in action*, except bank notes, which the Court considers as cash; for those words may certainly extend further than to bare furniture, and if any ready money were in the house (if not an extraordinary sum, and just received) that would pass. In the Countess of *Aylesbury's* case, I was of opinion, that by a devise of all things in a house, money and bank

(t) 1 Ves. sen. 271.

notes passed to the testator's wife, and that the testator meant to consider the notes as cash; but bonds do not pass, not admitting of a locality, except as to the probate of wills, &c. I think there is a difference between a legacy of goods on board a ship, and in a house," and so on. So that Lord *Hardwicke* was of opinion, that the words "goods and chattels" would not pass *choses in action*.

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There is also a case in Bro. Ch. Ca. of *Moore v. Moore (u)*, where Lord *Thurlow* held the same doctrine, and recognized the case of *Chapman v. Hart*. The question was, whether a bond found in a drawer in a house in *Suffolk* passed under a bequest of 'all my goods and chattels in *Suffolk*,' and whether the word *bona* would pass bonds and credits; and his Lordship said, "*Choses in action* have no locality. Bonds have no more locality than other *choses in action*, otherwise than by drawing the jurisdiction of the ecclesiastical court, and the judgment in that case (*Chapman v. Hart*) must prevail. In this case also it has weight that the house was given to the same person. Removal of goods for a necessary purpose is not an ademption of a specific legacy. But would you follow bonds and judgments in the same manner? It would be too much to argue it in that way. The authority of that case must go so far as to include bonds with other *choses in action* as to their want of locality."

(u) 1 Br. Ch. Ca. 127.

It

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It is thus settled that a bond, and stock have no locality any more than other *choses in action*, except for the purpose of probate and administration; and therefore as the words here are *bona & catalla felonum* they do not pass stock, which I consider is a *chose in action*, or in the nature of a *chose in action*. It is not a thing tangible of which you can take corporal possession, and therefore, without having recourse to the distinction founded on the words "in" and "within," as not passing any thing which is locally situate without the manor, stock, as a *chose in action*, does not pass by this grant as *bonum aut catallum*, and therefore it is impossible to refuse our judgment to the crown.

I am desirous of repeating such of the reasons which I have given as are founded on the fact stated in the replication, that the archbishop was seised at the time of these various grants of many other manors; for in case of his alienation of any or all of them singly to different persons, as he might have done, the absurdity and impracticability, which would ensue from adopting the construction contended for by the defendants, would be infinite and monstrous. Independently of that however we are of opinion, that judgment should be given for the crown. That is the opinion of the Court, at least with the exception of my brother *Garrow*, who has abstained, from motives of delicacy\*, from expressing any opinion; but my

\* Having been Attorney General when the proceeding was instituted.

brothers

brothers *Graham* and *Wood* concur fully in the judgment which I have delivered. The reasons which I have given are my own, and for those I am alone responsible.

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We therefore give

Judgment for the Crown \*.

[A question arose in the course of the proceedings in this case, in which department of the office they ought to be carried on, whether on the King's Remembrancer's, or the Treasurer's Remembrancer's side of the Court; but the present determination rendered the decision of that point of practice unnecessary.]

\* It appears by the following case, which is in Lane, 90, and the cases there cited *arguendo*, that the question of the locality of a *chase in action* of an outlaw on a similar claim, in virtue of a royal franchise, was made in this court in the reign of *James*.

#### BROMLEY'S CASE, *Hil. 8 Jac.*

*Hutton*, Serj. came to the bar, and shewed that one *Bromley* had before this time made a lease for years, in the county palatine of *Durham*, of certain coal mines in that county, rendering rent £100 *per annum*, which rent is arrear for divers years, and that *Bromley* became outlawed here in the Common Pleas for debt, at the suit of *Cullamour*, a merchant; and that the king had granted this debt, due upon this lease for years, as forfeited for outlawry unto him. And *Hutton*, for the bishop, said, that it belongs to him, because he had all the goods of men outlawed within his county; and if this debt belongs to the king or bishop, it was the doubt, the party being outlawed in the county of *Northumberland*, which is out of the county palatine of *Durham*.

TANFIELD, *Chief Baron*, said, that the debt shall follow the person; and he said that in 21 *Eliz. Vere and Jefferies* case,

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case, it was a question if debt upon a bond shall be forfeited to him who had such a privilege where the bond is; and he said that in this case it was resolved *that he shall have the bond and debt (who had bona utlagatorum) where the bond is*: and so it was resolved, as he said, in a case referred out of the realm of *Ireland*: but here is a debt which accrueth by reason of a real contract of goods in the county palatine, and he who is debtor is the party outlawed, but not in the county palatine of *Durham*.

And *Hutton*, Serj. said, that he had the roll of a case in this court in the time of *Edw. III.* that the bishop of *Durham* was allowed a debt in a more strong case than this is; for there a creditor was outlawed in *London*, and his bond was also in *London*, and the creditor was only an inhabitant within the county palatine, yet the bishop was allowed this debt.

*Curia*.—Put in your claim, and we will allow that which is reasonable, and it was adjourned.

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## SITTINGS AFTER TRINITY TERM,

58 GEO. III.

GRAYS INN HALL.

The ATTORNEY GENERAL v. The Marquis of  
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13th June.

IN this case the question was, the extent of the forestal rights of the crown within the manor of *Easthampstead* (*Berks*), as opposed to the claims of the defendant, the proprietor of the manor, under various grants from the crown, with a view to allotments of the commonable lands in that part of the forest of *Windsor* about to be inclosed under recent acts of parliament: and it depended entirely on the construction of those grants by the court, with reference to the facts put on the record by the finding of the jury.

Construction  
of the grants  
of the king.

A grant of exemption from forestal duties, does not pass the forestal rights from which those duties spring: therefore a grant of exemption from forestal duties, does not give such a right to the grantee as will give him a claim to an allotment on the inclosure of commonable lands within a forest, in consideration of the forestal rights.

On the trial of an issue, directed by those acts, for the purpose of ascertaining the rights of claimants in the usual way, the jury had returned

To pass forestal rights there must be express words, indicative of that particular purpose, in the grant. *Semle*, such rights, properly so called, are not grantable to a subject.

A grant of a manor to *A.* with particular words of reference to a previous grant to *B.* as "with all liberties, &c. &c. &c. which *B.* had"—"in as full and ample manner as *B.* held and enjoyed, &c. &c." is not sufficient to pass forestal rights, which had been granted to, and enjoyed by *B.*, without express words.

A decision in *Eyre* against a former grantee, and submitted to by him, if followed by conformable usage, is conclusive on those claiming under him.

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a special verdict\*, and on that the case now came on for argument :

*Shepherd* for the crown : and *Taunton, W. E.* for the defendant.

The arguments, and the cases which were cited, are fully stated and considered in the judgment of the court, as now delivered by

13th June.

THOMSON, *Lord Chief Baron*, (after time taken to deliberate,) as follows †.


This was a suit by the Attorney General, on behalf of his Majesty, on an issue as directed by two acts of parliament of the 53d and 55th of the King for the inclosure of *Windsor* forest.

Those acts have provided, that certain compensation

\* The parts of the special verdict on which the points in this case turned, were read and dwelt upon with much particularity and minuteness by the Lord Chief Baron, in delivering the judgment of the Court; and as his Lordship has so blended, with the passages to which he referred, the comments and observations which occurred to him, as that it would have been necessary almost to repeat the case again in the judgment, the special verdict is not stated here, in the usual course. Indeed, the judgment itself is altogether so complete a detail of the facts of the case, and the documents on which the claim is founded, that it has been thought necessary to state but very little more, for the purpose of introducing the substance of the question, and the nature of the claim.


† His Lordship had previously observed, that the judgment was given now, out of the common course, by consent, that it might be entered as of the last Term.

sation should be made to the crown, and all other parties interested in the forest, in lieu of the several rights, to which they claimed to be entitled in the forest so about to be inclosed. Those claims were thereupon referred to a trial at law, on a feigned issue, on which the question was,—whether his Majesty was, in fact, entitled to the forestal rights and interests claimed to belong to the crown, in and over the parishes and places within the regard of the forest.

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The acts of parliament recite, that the Marquis of *Downshire* claims to hold the manor freed and exempt from all forestal rights whatsoever; and the marquis, by his plea, says, that the king is *not entitled to any forestal rights or interest in the manor and parish of Easthampstead, for which compensation ought to be made under the act of parliament.* It is, in other words, a question, whether the crown is entitled to forestal rights there: for, if it is entitled to forestal rights, the compensation follows, as a matter of course.

This being the issue which was joined between the Attorney General and the Marquis of *Downshire*, it came on to be tried at the Summer Assizes for *Berks*, in 1814. A special verdict was then found, which states,—‘ That the forest of *Windsor* is an ancient and royal forest, within the county of *Berks*, extending over and comprising divers parishes and places, situate and being within the regard thereof; and that the

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within-named manor and parish of *Easthampstead* continually, from time immemorial, have been and are within the metes and (except the within-named park) parcel of the within-named forest: and that the within-named park was, up to and until the 2d day of *June*, in the 12th year of the reign of King *Charles I.* late king of *England*, also within the metes and parcel of the said forest.' The finding does not stop at the word 'metes:' and a good deal of argument was urged on the part of the defendant in this case, to shew that the manor of *Easthampstead* might be within the metes and bounds, and yet not within the forest; that is to say, not within the regard of the forest. The special verdict having found, 'that the manor and parish of *Easthampstead* are within the metes and bounds, and except the park, *parcel* of the within-named forest, and that the park was, up to the 12th year of *Charles I.* parcel of the forest;' the jury further state, 'that the park of *Easthampstead* is situate within the within-named manor and parish of *Easthampstead*, and that the king is not entitled to any forestal right or interest within the said park, but that the same park is exempt from all the laws of the forest, and all the rights of the crown, in respect thereof;' so that, with regard to the park, the jury, by their finding, have expressly negatived the crown's right to any interest whatsoever within the park, and consequently to any compensation whatsoever in respect of that. That part of the case, therefore, the jury have decided upon.

Then

Then the jury further find, (and this is a finding upon this special verdict, extremely material to be attended to;) 'that the king and his predecessors, kings and queens of *England*, have continually, from time immemorial, within the same manor and parish, except in the said park, from the said 2d day of *June*, in the 12th year of the reign of *Charles I.* exercised such forestal rights and interests as are claimed by, and to belong to his majesty, in and over the parishes and places within the regard of the said forest:' finding an actual usage by the crown of forestal rights over these lands, in respect of which they are now claimed, notwithstanding any supposed grants that may have existed, to convey the right from the crown.

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They further find, 'that before and on the 27th of *February*, in the 20th year of the reign of King *Henry III.*' (and this is the date of the first grant upon which any right which the defendants can claim must arise), 'the within-named manor and parish of *Easthampstead*, and the manor of *Hurley*, were within the regard of the said forest of *Windsor*; and that the prior and monks of the church of *St. Mary*, of *Hurley*, a cell of the abbey of *Westminster*, were seised of the within-named manor of *Easthampstead*, and of the manor of *Hurley*, with their appurtenances, in their demesne, as of fee, in right of their priory of *Hurley*; and that they being so seised thereof, certain letters patent were made by King *Henry III.* under his great seal of *England*, bearing date at *Woodstock*, on the said 27th day of *February*, in

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the 20th of his reign.' Those letters patent are then set out *verbatim*. They begin by reciting his Majesty's pious and good intentions towards which monastery; and he grants for him, and his heirs for ever, to God, and the church of *St. Mary, of Hurley*, (which is a cell of the abbey of *Westminster*,) and to *Richard*, the prior of *Hurley*, and the monks there serving God, and their successors, all the lands and donations of lands, men, alms, property, rents, and possessions, and so on, under general words: in short, a confirmation of whatever they then possessed; and it uses a great number of words of *Saxon* derivation, as 'infangenthef' and 'utfangenthef,' and a great many others, 'infang and forfang,' &c. &c. &c. and escape from prison, and murder, and robbery, and of money which belongs to murder and robbery, and forestalling, within time and without, and with all causes which are and can be;' and granting also, 'that the church of *Hurley*, and the prior and monks, be quit of all mercies, and that they, and all the men of the tenements which they hold of the same prior, be free from all '*scot* and *geld*.'—Those terms, it was contended, were properly terms which applied to impositions in the forests; but that is not so, for it means tax and tribute every where, in point of fact, and thus it is true, it may include the forest,—'and all aids of the king's sheriffs, and their ministers, and mercy and fine of county, and hydage, and carucage, and danegeld, and horngeld, and wapentake, and talliage, lastage, and stallage, and sewynge, miskenning, mandbrig, burchbrig, shires and hundreds,

*swanimotes,*

*swanimotes*, pleas and plaints, assizes, views and summonses: and of the carrying of treasure, and ward and wardpenny and averpenny, and hundred penny and bordhalfpenny, and theirthingpenny: and from all works of castles, parks, walls, vivaries, and bridges, inclosures, and from all carriage, summage, and navage, and the building of royal houses, and all manner of work; and the king forbids 'that the woods of the aforesaid prior and monks shall be, in any manner, taken for the works aforesaid, or any other; and likewise that the corn of them, or of their men, or any of the chattels of them, or of their men, shall be taken for the purveyance of castles; and he wills that they may be freely and sufficiently, without any exaction of *chiminage*,' (which is a toll for wayfares through the forest,) 'or other impediments, take of all their woods to their own proper use, when they will, nor shall they, by reason thereof, be put in forfeiture of waste, or in mercy; and also all lands, purprestures now made, and all the assarts of them, and their men, who are not earls or barons now made, and which thereafter shall be made by royal assent: *and he quits claim to them, for ever, of waste and regard\*, and of the view of foresters, and of all other things which to forest or foresters pertain; and that they, and their successors, for*

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\* It was contended, in the argument for the defendant (citing Coke, 4 Inst. 306.), that the effect of these words was a complete disafforestation; and that where a forest was once disafforested, the forestal rights could not be revived without matter of record, since the *Carta de Foresta*.

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*ever, and their aforesaid men, of the tenements which they hold of them, be quit of the lawing of dogs.'*

This last sentence certainly does purport to convey to them exemptions (for that is the view in which I see it) from their attendance on these swanimote courts, and from the view of foresters (who are the persons who by the law of the forest are to watch and take notice of the misconduct of the persons within the forest, with regard to that forest,) and of all other things which to forest or foresters pertain, and that they shall be quit of the lawing of dogs—that lawing of dogs being (as we all know) what the foresters were to do, as part of their duty, in respect to the cutting off the claws of dogs within the forest, to prevent their chasing the deer.

Then follows this, which has nothing to do with the forest.—‘That the prior and monks and their men, of the tenements which they hold of them, be free and quit of all toll in every market, and in all fairs, and in all passage of bridges, waters, ways, and of the sea throughout our whole kingdom, and throughout all our lands in which we can grant liberties to them, and that all the wares of them and of their men in the aforesaid places, be likewise quit of all toll.’ The king then grants, that ‘they may have view of frankpledge in all their lands and tenements, with plea of unlawful distress, and with fines for licence of agreement’—and then he grants and confirms to them—  
‘that

‘ that if any of their men who are not earls or barons, for his offence ought to lose life, or member, or shall fly and will not abide judgment, or shall have committed any offence for which he ought to lose his chattels, wheresoever justice ought to be done, either in our Court or in any other Court, the same shall be the chattels of the aforesaid prior and monks, and that it shall be lawful to them, without the disturbance of the sheriffs and all our bailiffs and others, to put themselves in possession of the aforesaid chattels, in the aforesaid cases, and in others, where the king’s bailiffs, if the same chattels belong to him, may and ought, to seize the same into his hands.’—Then it grants, ‘ waifs, and estrays, and if any of the tenants of the aforesaid prior and monks shall forfeit their fee which they hold of the aforesaid prior and monks, it shall be lawful to them to put themselves in seisin of the said fee, and the said fee, with the appurtenances, to possess, notwithstanding that the king have been accustomed to possess the fees of fugitives, and persons condemned for a year and a day, and if any of their tenants or men, except earls and barons, be amerced before the king, or the justices, sheriffs, constables, foresters, bailiffs, or other his ministers of what condition soever they be, for whatever cause, offence, or forfeiture, the said prior and monks shall have all the mercies, and amerciaments, and fines, for the licence of agreement, and their distresses without any contradiction; and if it shall happen in any case, the said mercies and amerciaments shall have  
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been collected by the bailiffs of the king, or his heirs, they shall at his Exchequer, by the view of the treasurer for the time being, be restored to the same prior and his successors without diminution;’ also he grants and confirms to them, that ‘if it shall happen, that they shall not have used any of the aforesaid liberties, nevertheless, they may hereafter use the same: and prohibits, any one thereupon to vex or disquiet the aforesaid prior and monks thereof, or to do, or permit to be done to them, any molestation, or injury, or put them in plea of any of their tenements which they hold, except before the king and his heirs, or their justices; also granting, that no one shall enter their fees, or may have, or retain their lands, without the consent of the prior for the time being; all which things he grants and confirms to them *in pure and perpetual alms, with all liberties, and free customs*, which the royal power can more fully confer on any religious house for the love of God, and for the soul of the Lord the King *John*, his father, and for the souls of all his ancestors and successors: and he prohibits upon forfeiture, &c. *that any justice, sheriff, constable, forester, or their minister, do intermeddle himself or themselves, in any matter great or small, concerning their lands, rents, possessions, or woods, against this charter, nor forfeit them or their men in any thing inasmuch as we have taken them, and all the property and possessions of them and of their men into our custody and special protection.*’

Then

Then the special verdict finds, that on the 16th day of *May*, in the 2d of *Henry IV.* letters patent were made and passed by writ of the privy seal to this effect:—‘The king, considering that the church, belfry, and priory houses of *Hurley*, within the forest of *Windsor*, which is of the foundation of the progenitors of *Mary*, the king’s late most dear consort, deceased, and in the king’s patronage, are so weak and ruinous, that for the reparation of the church, belfry, and houses aforesaid, the prior and convent of the aforesaid priory cannot provide:’ the king, of his special grace, and by the assent of his council, granted to the same prior and convent ‘licence to fell, sell, and to their own proper use take competent wood for timber and other wood to the value of one hundred marks of their own wood, within the forest aforesaid, for the reparations of the church, belfry, and houses aforesaid, without the disturbance or impeachment of the king or his ministers whomsoever, saving always the vert for the king’s wild beasts there, by the survey of the foresters and other officers.’

So that here, notwithstanding the supposed grant of *Henry III.*, which is contended to have passed to the convent the right of taking their own wood without any disturbance, we find that in the 2d *Hen. IV.* there is a licence to take a portion of their own wood only, and that only for a particular purpose, namely, for the repair of the belfry of the church and the priory houses within that priory. That is certainly not consistent with the

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the notion that they had under their grant of *Henry III.* any such right as that of taking the wood generally: it bears strongly the appearance that at that time of day the grant had not been put in use, so far as the wood was concerned; if it had, there would have been no occasion for this special licence from *Henry IV.* so many years after to grant to the monastery, this particular right of taking the wood for this special purpose, and it is to take it only for once, it is not that they may take it from time to time, but to take it for once, and for this special purpose.

They then find the dissolution of this, (which is a lesser) monastery by the act of parliament of the 27th of King *Henry VIII.* by which it is enacted, 'that all monasteries and religious houses not possessed of 200*l.* a year, and every thing belonging to them, shall be dissolved, and that his highness shall have all such monasteries and religious houses which at any time within one year next before the making of that act had been given and granted to his majesty by any abbot, prior, abbess, or prioress, under their convent seals, or that otherwise had been suppressed or dissolved, and all and singular the manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, churches, chapels, and so on, and all other interests and hereditaments to the same belonging to hold to the crown for ever.'

The verdict then states, that 'by virtue of that act of parliament, King *Henry VIII.* became and was

was seised of the within-named manor of *Easthampstead*, and of the said manor of *Hurley*, with their appurtenances in his demesne, as of fee in right of his crown of *England*, in such manner and form as the said act of parliament passed the same.'

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There is then set out a grant from King *Henry VIII.* of the 19th of *May*, in the 36th year of his reign, in consideration of 400*l.*, to *Leonard Chamberlayne*, Esq. amongst other things of the 'within-named manor of *Easthampstead*,' and the manor of *Hurley*, with all their rights, members, and appurtenances in the said county of *Berks*, to the said late priory of *Hurley* formerly belonging, and being parcel of the possessions thereof, and also amongst other things of all and singular messuages, houses, edifices, mills, waters, fisheries, fishings, glebe lands, meadows, feedings, pastures, commons, knight's fees, escheats, reliefs, rent, reversions, and services, and also woods and underwoods, and other his rights, profits, commodities, emoluments, possessions, and hereditaments whatsoever, with all their appurtenances in the towns, fields, parishes, and hamlets, of *Hurley* and *Easthampstead*, in the said county of *Berks*, and elsewhere soever, *to the said manors, or either of them, in any wise howsoever, belonging or appertaining, or as being members or parcels of the same, thentofore had, known, accepted, reputed, occupied, or used as fully and entirely, and in as ample manner and form as the last prior, and the late convent of the said late priory of Hurley, or any of the predecessors of them, in right of*

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*of the said late priory of Hurley, at any time before the dissolution of the same late priory had, held, or enjoyed, or ought to have held or enjoyed the aforesaid manor, lands, tenements, and other the premises, with the appurtenances, or any parcel thereof, and AS FULLY AND ENTIRELY, AND IN AS AMPLE MANNER AND FORM AS ALL AND SINGULAR THE SAME PREMISES CAME TO THE HANDS OF HIM THE SAID LORD HENRY VIII. late king of England, by reason of the dissolution of the said late priory, or of any act of parliament, or otherwise, and in his hands then were or ought to be, or to have been, and also such sorts of courts leet, view of frankpledge and free warrens, and all things to view of frankpledge and free warren, belonging, and all chattels, waifs, and estrays, and all other profits, &c. which, &c. and AS FULLY AND ENTIRELY, IN AS AMPLE MANNER AND FORM AS THE SAID LAST PRIOR, as fully and entirely, and in as ample manner and form as the said last prior, and the late convent of the said late prior of Hurley, or any of them, or any or either of the predecessors of them, had, held, or enjoyed, or ought to have had, held, or enjoyed, in the manors aforesaid, and other the premises, by reason or pretext of any prescription, use, or custom theretofore had or used, or by reason or pretext of any grants or confirmations, or of any letters patent by him the said Lord Henry, or any of his progenitors of the said prior, &c. or any of his predecessors in anywise however made or granted, or by any other mode whatsoever: to have and to*

*to hold the aforesaid manors, messuages, lands, tenements, courts leet, view of frankpledge, chattels, waifs, estrays, free warren, and all and singular the premises above expressed and specified, with all their appurtenances to the aforesaid Leonard Chamberlayne, his heirs and assigns for ever.*

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There is not, therefore, in this grant—of the manor, and of what, strictly speaking, belongs to the manor only, as far as I can read and construe the grant—any express mention made of forestal rights, as being intended to be conveyed by this grant. It is a grant of the manor, and of all things belonging to that manor as fully as the priory enjoyed it at the time of the dissolution. It grants (what I did not perceive to be contained in the grant of *Henry III.*) free warren. I believe it occurs here for the first time. Now a grant of free warren is by no means a grant of forestal rights; for the beasts of the warren are very different from the beasts of the forest: the beasts of free warren are said to be only hares, conies, and the roe, and certainly free warren does not comprehend beasts of the forest, therefore, nothing properly a forestal right, can pass by that: Then the grants runs ‘To hold and enjoy these manors, messuages, lands, tenements, courts leet, view of frankpledge, chattels, waifs, estrays, free warrens, and all and singular other the premises above expressed and specified, with all their appurtenances to *Leonard Chamberlayne*, his heirs and assigns, for ever.’

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The jury find, that 'by virtue of these letters patent, the said *Leonard Chamberlayne* became, and was seised of the within-named manor of *Easthampstead* and the manor of *Hurley*, with the appurtenances, and of such of their said liberties, franchises, immunities, and privileges, therein mentioned, as did or might pass thereby.' In point of fact, the jury have not found what he actually did possess under this grant, but say, that he became seised of what did or might pass by that grant.

They further state, 'that the manor of *Easthampstead*, and the manor of *Hurley*, with every of their rights, members, liberties, franchises, immunities, privileges, and so on, granted to *Chamberlayne*, afterwards by divers lawful conveyances became, and were vested in *Richard, Lord Lovelace*; and that the said manor of *Easthampstead*, with every of the rights, members, liberties, franchises, and so on, granted to the said *Leonard Chamberlayne*, became and was vested in the said *Arthur, Marquis of Downshire*; and that, at the time of passing the act of the 53d of *Geo. III.* for inclosing the common lands within the forest of *Windsor*, he was seised to him and his heirs, of and in the said manor of *Easthampstead*, with every of its rights, members, and appurtenances, and of the liberties, franchises, immunities and privileges thereunto belonging and appertaining, as fully, freely, and entirely, and in as ample manner and form as the said *Leonard Chamberlayne* was seised thereof, by virtue of the said grant to him

him thereof made.' I have already stated, that it is not found what *Leonard Chamberlayne*, in point of fact, possessed under that grant.

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It is further stated, that 'on the 6th day of *February*, in the 6th year of the reign of King *Charles I.* the said *Richard*, Lord *Lovelace*, being then seised of the said manor of *Hurley*, with every of its rights, members, *liberties, franchises, immunities, privileges, and appurtenances*, by the said letters patent granted to the said *Leonard Chamberlayne*, in his demesne, as of fee, a *certain licence* was given under the hand of *Henry*, Earl of *Holland*, Chief Justice in *Eyre*, for the precinct on this side *Trent*, having full power and authority, by virtue of his office, to grant the same, which is set out *in hæc verba*; and it states, 'that the Justice in *Eyre* had been certified by Sir *Richard Harrison*, Knt. one of the verderors of his Majesty's forest of *Windsor*, in the county of *Berks*;' so that it seems, that at this time, the king was exercising—and, indeed, the special verdict has expressly found, that he had, from time immemorial, except as to the park, since the 12th of *Charles I.* when the grant was made, exercised—forestal rights. It appears by this document that the verderors, whose duty it was to inspect the timber, and other things on the forest, had certified 'that there was a certain coppice of the Right Hon. *Richard*, Lord *Lovelace*, commonly called or known by the name of *Dodslie's Coppice*, containing, by estimation, twenty acres, or thereabouts, lying and being in

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*Hurley*, in *Fyne's* bailiwick, within the forest of *Windsor*, and county of *Berks*; and that the same might conveniently be felled, that year, without destruction of the vert or hurt to his Majesty's game; and the Justice in *Eyre* says, 'I have therefore thought good, for the causes aforesaid, and at the request of the said Lord *Lovelace*, who is owner of the said coppice, to give licence to the said Lord *Lovelace* to fell down and inclose the said coppice, so that the same be sufficiently fenced and kept with fences and hedges, according to the assize of the forest, for nine years next coming after the date thereof.'

There had also been a licence granted many years before, in *Henry IV.'s* time, to the convent, to fell their own wood, for a particular purpose, which I have already noticed; and then again, so late as the 6th of *Charles I.* there was this licence granted, in consequence of the approbation of the verderors of the forest, and other officers, to Lord *Lovelace*, to fell and inclose his coppice for that year, so that the same be sufficiently fenced, and kept with fences and hedges, according to the assize of the forest, for nine years next coming. And that is found by the jury, who state by this verdict, that they further find, that on the 16th day of *January*, in the 10th year of the reign of King *Charles I.* one *Richard Libb*, Esq. being then seised of a certain coppice, situate in the within-named manor and parish of *Easthamstead*, in the said forest of *Windsor*, in his demesne, as of fee, a certain other licence was given under

under the hand of the said *Henry*, Earl of *Holland*, Chief Justice in *Eyre*, of the precinct on this side *Trent*, having full power and authority, &c. which is just to the same effect as that licence which was granted to Lord *Lovelace*: and this licence, I take it, was granted, according to the date of it, subsequent to the disallowance of Lord *Lovelace*'s claim, before the Chief Justice in *Eyre*, which, I apprehend, was in the 8th of *Charles* I. In the 10th of *Charles* I. then this further licence is so granted: it is precisely in the same terms as that which had been granted to Lord *Lovelace*, as the owner in fee. It is, to cut wood in a coppice, within this manor of *Easthampstead*, of which the Marquis of *Downshire* is now seised, and with respect to which he claims to exclude the crown from all forestal rights upon that manor.

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The jury, with respect to the park, have taken upon themselves, very properly, to decide upon the forestal right; they state that 'the late King *Charles* I. and his predecessors, were, from time immemorial, seised of the within-named park of *Easthampstead*, in right of his and their royal crowns: and that *Charles* I. being so seised, did, by letters patent made under his great seal of *England*, bearing date at *Westminster*, on the 2d of *June*, in the 12th year of his reign, grant for him, his heirs and successors, to *William Trumball*, Esq. the park of *Easthampstead*:' not with any general words, which might be of doubtful import how much they carried, and how much they did not; but with certain express words:

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‘to hold and enjoy the same, free and exempt from all the laws of the forest, and all the rights of the crown, in respect thereof, and his heirs and assigns, for ever.’ So that, with regard to the park, it seems perfectly clear, that by fit and apt words contained in this grant, not only the park passed, but all forestal rights passed; and with regard to the park, it may therefore be said to be disafforested; but then *that is confined to the park, and to the park only*. Then the verdict states, that the same park has since, by divers lawful conveyances, become, and is now vested in the Marquis of *Downshire*.

These facts having been found by the special verdict, the doubt submitted to the Court by the jury is, whether or not, upon the whole matter found, the king is entitled to any forestal rights or interest within the within-mentioned manor and parish of *Easthampstead*, out of the said park of *Easthampstead*, for which a compensation ought to be made under and by virtue of the within-named act of parliament made and passed in the 53d year of the king. That they submit to the judgment of the court; ‘that if upon the whole matter it shall seem to the Court that the king is entitled to such forestal rights and interest within the within-mentioned manor and parish of *Easthampstead*, out of the said park of *Easthampstead*, as are claimed by, and to belong to his majesty in and over the parishes and places within the regard of the said forest, then they say, that the king is entitled to forestal rights and interests within the within-

within-mentioned manor and parish of *Easthampstead*, out of the said parish of *Easthampstead*, in manner and form as the Attorney General has within claimed; and if upon the whole matter it should seem to the Court that our lord the king was entitled to forestal rights and interest within the same manor and parish, but that such rights and interest had been diminished by grants, charters, or other means above mentioned, so as that such forestal rights are not so extensive in the said manor and parish as in the other manors and parishes mentioned in the said act of parliament; then they say, that our lord the king is entitled only to such limited rights and interest as it shall seem to the Court that our lord the king is entitled unto: and in such case it was agreed to refer the proportion of his majesty's compensation for such his limited rights therein, to an arbitrator who is mentioned in the special verdict. But if upon the whole matter it shall seem to the Court that our lord the king is not entitled to any forestal rights or interest within the within-mentioned manor and parish of *Easthampstead*, for which compensation ought to be made under and by virtue of the last-mentioned act of parliament: then the jurors say, that our lord the king is not entitled to any forestal rights or interest in the within-named manor and parish of *Easthampstead*, as the Attorney General for our lord the king has within claimed. This is the substance of the special verdict which has been found, and which raises the questions upon which the Court are now to decide.

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It was contended on the part of the crown that there were no forestal rights intended to be passed by this grant of *Henry III.* to the priory, which has been mentioned—that there was nothing to convey the forestal rights, and that the words of general reference in the subsequent grant of the crown to *Chamberlayne*, after the possessions of the monastery had come to the crown, were not sufficient for that purpose,—that there was no allowance of it in *Eyre*,—and that in the reign of *Henry IV.* and afterwards licences were granted to cut wood, which would have been unnecessary if they had had forestal rights. That I have stated before and observed on. Then the case of Lord *Lovelace* himself, who had claimed certain rights, or rather exemptions, within this forest in the 8th of *Charles I.* was cited and relied on, where certainly all his claims whatever they were, were disallowed. The report of that case is in Sir *William Jones*, but Sir *William Jones* certainly has not stated the whole of the claim which was actually then made. It appears by the record from the Tower, that the claim was more extensive than is there stated: in short, that the claim comprehended every thing that was granted by name to the convent, by the grant of *Henry III.* And he claimed also free warren which was not given by that grant of *Henry III.* but by the subsequent grant of *Henry VIII.* It was, in fact, bringing before the Court of *Eyre*, the whole that he could possibly lay any claim to, under any title whatsoever, and the result of that was, that by the Court in *Eyre*, that claim was wholly disallowed, and

*and it does not appear that any subsequent steps were ever after taken to impeach that judgment of the Court in Eyre.*

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It was contended on the part of the defendant however, that the crown, under the circumstances was not entitled to any forestal rights: or if it was, that they were only of a limited nature. To shew that the king was not entitled to any forestal rights, or that they were limited; it was contended that these grants passed entirely, or in part, all, or some forestal rights. We are, however, of opinion, that they did not; for *the grants themselves not being of forestal rights in terms, but only as it seems, to us, of certain exemptions from forestal rights*, not of the forestal rights themselves, as passing, or intended to pass, by those grants—*exemptions from attending courts and a variety of other minor exemptions, such as from having their dogs lawed, &c. :—but nothing is therein expressed to have been intended to pass, so as to exclude the crown from exercising in right of the crown, as it has exercised in point of fact, the forestal rights which inherently belonged to the crown.*

But it was contended, though not very strongly, that, supposing the monastery to have had these forestal rights at the time of the dissolution, and that they came with the property belonging to the monastery, that is to say, with the manor to the hands of the crown, they were well granted by the new grant to *Chamberlayne*. Now *Chamberlayne's* grant certainly contains no special men-

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tion of any thing like forest rights: it is a grant, as confined to the manor, of the manor, and of all privileges, and every thing which with that manor ought to be enjoyed. *Upon the defendant's construction of it a great question would arise, (which, it seems to me, ought to be answered in the negative,)* whether the crown could, in this way, convey the *forestal rights*. But there was no grant in the letters patent, of any right to chase or kill beasts of the forest. The non-usage, since *Chamberlayne's* grant, explains what was not comprised in it, and the actual finding of the jury upon this subject seems to be, I think, decisive, that the forestal rights have ever been exercised by the crown, notwithstanding those grants, with the exception only of forestal rights within the park, since the deed of the 12th of *Charles I.*

Upon the law of the question, as to what passed under such general words in a grant from the crown, I think the case of the Bishop of *Coventry* and *Litchfield*, in 2 *Rolle's Abr.* 203. is material to be attended to, as it is decisive on that point. It is this:—‘If the king grants certain manors, which are within his forest of *D.* to a bishop and his successors, and grants besides that they shall have the said manor free, and acquit of the said forest, and pleas of the forest, &c.; and after the said manors come into the hands of the king, and he restores them to the bishop,’—I say, *restores* them, for so I translate the word *reddit*, and that I take to be the true meaning of it,—‘still the bishop shall not

not be exempted of the forest for these manors.' In 2 *Rolle's Abr.* 193. Tit. *Prerogative le Roy*, l. 25. under the head, of 'What things shall pass by general words,' I find the following case:—'The dean and chapter of *J.* were seised of divers manors in *Essex*, in fee, and in the 1st of *Edward IV.* the king grants to them and their successors, that they shall be discharged of all purveyance of the king in their manors in *Essex*; and afterwards, by the 27th of *Henry VIII.* c. 4. it was enacted, that the purveyors of the king might purvey in all for the king's provision, as well within liberties as without, notwithstanding any grant to the contrary; and afterwards, in the 35th of *Henry VIII.* the dean and chapter surrender their manors to the king, his heirs and successors; and afterwards the king grants the same manors to the ancestors of Lord *D'Arcy*, with *tot tales quantas et hujusmodi libertates*, as the dean or chapter, or any of their predecessors had, any statute notwithstanding. In this case, in as much as the old liberties were extinct by the statute, this general grant shall not create anew the said liberties that the dean and chapter had before.' Then follows another case, l. 41. 'The bishop of *Coventry*, among other liberties, had a liberty *de catallis felonum*, within his manor of *B.* and afterwards this manor came to *Henry VIII.* by attainder, and this is granted, with *tot tales tantas et quales libertates*, the bishop, or his predecessors had: the grantee shall not have by this grant the same liberties which

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which the bishop had, for when they are once extinct, the words of revivor will not be sufficient; but there ought to be words of grant, and such general grant will not be sufficient.' It seems to me, therefore, on these authorities, that there is no ground for contending, that the general words contained in this grant to *Chamberlayne*, could grant this liberty to him, even provided the convent had had them.

I have already stated, that the convent nowhere appears to have had granted to them a liberty of chasing and killing beasts of the forest, but only exemptions from certain services, which, as belonging to the forest, they were bound to perform, and certain exemptions from the regard of the officers of the forest, for their defaults.

I was very desirous of finding what kind of remedy there was, provided there had been an improper disallowance of the claims, made before the Chief Justice in *Eyre* : and I find it appears, in the first place, that if they should refuse to receive the claim, there is an old writ in the *Register de libertatibus allocandis*, which lies in case of their refusal, and that is mentioned in 4 *Inst.* 297. And if having received the claim, they give an erroneous judgment upon that claim, a writ of error lies (it is expressly stated) from that judgment to the Court of King's Bench. Now certain it is, that this disallowance of Lord *Lovelace's* claims has been acquiesced in, from that time down to the

the present, and there appears to have been no attempt, by a writ of error, or otherwise, to get rid of it, although it is plain he might have so done if he had thought proper.

There was only one point in that case of Lord *Lovelace*, which the Court took time to consider about, that was, as to the courts leet; but that is totally different from any thing claimed under the idea of forestal rights: that is a grant of what is generally contained in grants to lords of manors; but as to all his other claims, according to that case they were totally disallowed; and he made no attempt whatever to bring into review the decision of the then Court of *Eyre*. The jury do not find that these grants were ever put in use; on the contrary it is found, by this special verdict, that all forestal rights were exercised by the crown over the manors, except within the park, from the time of granting that park with an exemption from forestal rights, by express name. What ground is there for saying, therefore, the grantees had any such rights given to them, as to exclude the crown from the exercise of its forestal rights. They had indeed certain privileges, in the nature of exemptions: and supposing those exemptions to have been well granted, and put in use, still the king's forestal rights, namely, his chace of venison, and the preservation of the vert, would have remained to the crown, notwithstanding these grants. It is, in respect of the right on the land principally, I should imagine, that the compensation provided for by the act is to be made, but it is on the forestal

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restal rights, as far as either party is entitled, that any right in respect of the land depends.

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There seems to be no ground for drawing any line between the crown's being generally entitled to forestal rights, or only to some partial rights: I mean, on any of the facts of this case: so that the second matter referred to the Court seems not necessarily to arise; for if we are satisfied, from the facts disclosed, that the king still has his forestal rights, I think we are bound to say, that the first finding in the matter referred to us, by the verdict, is right, and that the king is entitled to all his forestal rights on this place, (with the exception of the park,) taking it in the words in which the jury have referred the question on the matter to us.

It seems to me, for the reasons I have given, (and those I am alone answerable for,) though the whole Court concurs in the conclusion, that the king is entitled to the forestal rights in the way the special verdict has submitted them to us: and therefore the entry, I take it, should be, that 'it appears to the Court that our said lord the king is entitled to such forestal rights and interest within the within-mentioned manor and parish of *Easthampstead*, out of the said park of *Easthampstead*, (for that is the question referred to us by the special verdict,) as are claimed by, and to belong to his majesty, in and over the parishes and places within the regard of the said forest.'—(I have already

already stated, that it appears very plainly that this manor was clearly once within the regard of the forest, it being so stated and so found by the verdict,—and that the ‘king is entitled to such forestal rights and interest, in manner and form as the Attorney General hath within claimed.’

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*Coram* RICHARDS, L<sup>D</sup>. CH. BARON.

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 12th January.  


CUFF v. BROWN, and others.

*16 Sim 622*

THE case, as it appeared by the pleadings, was as follows:—In the beginning of *October* 1812, the plaintiff entered into an agreement with the defendant *Brown* and *Samuel Cary*, of *Bristol*, who were then in partnership as conveyancers, attornies, and solicitors, to place *William Cuff* the younger, the plaintiff's son, with them as an apprentice, in the business of conveyancer for eight years, and to *article him at the end of the first three years as an articulated clerk* in their business of attornies and solicitors, and they were to receive the sum of 100*l.*; the payment of which was to be secured by a promissory note for 99*l.* 19*s.* payable at the end of three years. The note was drawn and delivered to *Brown*, and an indenture dated the 29th *October* 1812, was accordingly prepared and executed between *Cuff* the elder and *Cuff* the younger of the first part, and the defendant *Brown* and *Cary* of the other part. It witnessed

If an apprentice after serving two years of his time, and without any misconduct on the part of the master, runs away of his own accord, and enlists as a soldier, and afterwards is willing to return, but the master will not receive him again, the master is not compellable to return any part of the apprenticeship fee.

Nor will the court restrain the holder of a promissory note given for the amount from proceeding to recover it at law, by injunction, under such circumstances.

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also prayed for an injunction to restrain the defendant *Hurd* from suing out execution.

The defendants by their answer negatived the fraud, and insisted that the indenture was conformable to the agreement, which was that the 99*l.* 19*s.* was to be paid at all events after the execution of the indenture; and the defendant *Hurd* denied any knowledge of the circumstances charged by the plaintiff, and that he brought the action as the agent of *Brown*, but said that he had received it in payment of a debt due to him from *Brown*.

There were no witnesses examined on either side.

*Dauncey* and *Wray*, for the plaintiff, contended, that the indenture was not in conformity with the agreement; for that the premium was not intended to be paid, unless in the event of *Cuff* the son being articulated as an attorney to the defendant *Brown*; and that as *Brown* refused to take *Cuff* the son back again, the plaintiff was entitled in equity to have the premium returned, or at least a proportionate part; and that *Hurd*, whom they alleged to be the mere agent of *Brown*, for the purpose of bringing the action, ought to be restrained from taking any advantage of the judgment obtained: and they cited *Therman v. Abell* (a).

*Martin* and *Roots*, for the defendant *Brown*, insisted that the indenture was conformable to the

(a) 2 Vern. 64.

agreement;

agreement; that the premium was payable in the first instance upon the execution of the indenture, and did not depend upon the contingency of his being articled as a clerk to *Brown and Cary*, in their business of attornies—that *Brown* had done all that was required of him; and that the contract was broken and put an end to by the act of *Cuff* the son—that this case was distinguishable from the case of *Therman v. Abell*, because in that case the master himself had put away the apprentice; but here the apprentice had run away—and that there was no case made out to warrant the interference of the Court: and they cited *Argles v. Heaseman*, (b) to shew that the Court would not take upon itself jurisdiction in such a case.

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*Agar and Duckworth*, for the defendant *Hurd*, were stopped by

The *Lord Chief Baron*, who said, There is no evidence to charge the defendant *Hurd*, who is a *bond fide* holder for a valuable consideration, with any improper conduct: nor any case made out against him; and therefore as against him the bill must be dismissed with costs.

With respect to the question of jurisdiction, the Court has jurisdiction in this case, as it was necessary for the parties to come here to discuss the question as between the defendants *Brown* and *Hurd*, although the question between the other parties might have been tried at law. The pre-

(b) 1 Atk. 518.

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mium of 100*l.* is a consideration applying to, and extending over, the whole term of eight years. I am told the deed is not according to the agreement; but when I see the deed executed I must have that made out most clearly: and indeed, as it appears to me, I see no contradiction between them. The point is this:—The youth having remained as a clerk two years runs away of his own accord, and enlists as a soldier: he may or may not come back: he chuses however to come back, and then he asks for a return of the premium. It does not appear that there was any misconduct on the part of the master; it is not fair therefore that the young man should demand a return of the consideration money, because he chuses to run away. There is another circumstance to be considered—he may stay with his master for four years, and then run away when his services are become more valuable; and is the master to lose the benefit of that service? It is stated that at one time the master was willing to take him back, but that makes no difference, for there is no contract to bind the master; and it was at the master's option to take him back or not. It makes no difference the money not being paid at the time; for if the money was due on the note, it must be paid, if you can apply it, as the consideration for the indenture being executed. The master performed his contract until it was put an end to by the apprentice, and he is therefore entitled to retain the money arising from the note, as much as if the premium had been paid in money. The bill therefore must be dismissed against the defendant *Brown* without costs.

*Coram*

*Coram* RICHARDS, L<sup>d</sup>. CH. BARON.

1818.

Saturday,  
17th January.

FAREBROTHER v. PRATTENT and AITCHESON.

<sup>39th 19 20th 185</sup>  
THE plaintiff (an auctioneer) sold to the defendant *Prattent* an estate, belonging to *Aitcheson*, by public auction, on which the purchaser paid him a sum of money, by way of deposit, but the defendants did not conclude the purchase, in consequence of disputes about the title.

A plaintiff in an interpleading bill having done all in his power to bring the parties before the Court, may obtain a decree, although one of the defendants have not answered, and is not present at the hearing, if he (having appeared to the process,) has been duly brought into contempt for want of answer.

Both of them had claimed the deposit-money from the plaintiff, and *Prattent* brought an action at law to recover it. The plaintiff filed this bill for an interpleader and an injunction, and he paid the deposit-money into Court, *minus* the auction duty, which he had paid to the excise.

*Both* the defendants *appeared*; but *Aitcheson* afterwards absconded, and never put in an answer. The plaintiff having proved him to be in contempt, \* obtained an order, that as to him the bill should be taken *pro confesso*.

The cause came on for hearing in the course of the last Term, as between the plaintiff and the defendant *Prattent*; but the other defendant, who had not answered, did not then appear; when

\* He was also outlawed.

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*Rosè*, for the defendant *Prattent*, raised the objection, that even if this were properly a case of interpleader, (which he submitted it was not,) it could not be sustained till all the parties called on to interplead were brought before the Court, and were present at the hearing.

In *Stevenson v. Anderson* (a) the Lord Chancellor said, that it rests upon the plaintiff to bring all the parties into the field who are to contend together, whether they were within or without the jurisdiction; and in *Jones v. Gilham* (b) it was held to be the course of practice, that the plaintiff should set down the cause for hearing. It is therefore incumbent on *him*, in the first instance, to put the cause in a state to be heard, whatever protection the Court may afterwards think fit to extend to him, by injunction or otherwise, with respect to the subject-matters of the prayer of his bill.

The *Lord Chief Baron* enquired, if any precedent was in the recollection of any of the Bar who were present, of an interpleader decreed, where one of the defendants had not answered, and did not appear at the hearing: *Roupell* having mentioned the case of *Hodges v. Smith* (c).

The cause was then ordered to stand over, to afford counsel an opportunity to furnish themselves with whatever precedents and authorities there might be to be found on that point.

(a) 2 Ves. &amp; Bea. 407.

(c) 1 Cox, 357.

(b) Cooper's Ch. Rep. 219.

The counsel for the plaintiff now admitted, that he had not met with any case more in point than that of *Hodges v. Smith*: which, however, (he submitted,) was, in principle, an authority for going into the case, and making a decree in the absence of one of several defendants; and having stated his merits,

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The *Lord Chief Baron* determined (having observed that there was no doubt that the present was a proper case of interpleader) that the Court might make a decree in favor of a plaintiff, in the absence of a defendant, who was in contempt for want of answer, provided the plaintiff had used all necessary diligence. Here the plaintiff (*having appeared*) the absent defendant is still, in the eye of the law, before the Court, although not present at the hearing. Therefore there must be a

Decree for the plaintiff: with  
 Costs, to be taxed, and  
 paid out of the fund in  
 Court.

10 ch. 10.

306

LR 5 Hlds 328

LR 16 L 445 CASES IN THE EXCHEQUER,

2 H & M 537

1 M & N 866 167

5 H & M 479 2 Decy 41 515

4 Decy 163,

7 H & L 253

1818.

Saturday,  
17th January.

TAYLOR v. BAKER, STRONG, METCALFE, and another.

1. H & M 57. 18 H & M 423

If a purchaser have been informed that there are any previous claims on the vendor, which would be a lien on the land, before payment of the purchase-money, it is such sufficient notice as to put him on enquiry; and if the lien turn out to be not of a precisely similar nature, as if he have been told that A. had a judgment, who, in fact, had a mortgage, it is yet, to a certain extent, legal notice, and the Court will set aside conveyances made after such notice in prejudice of the prior incumbrancer.

Where a sale or mortgage is a fraud on a prior incumbrancer, the Court will give costs against the vendee or mortgagee, on setting aside the deeds.

THE plaintiff filed this bill in the character of a prior incumbrancer, with notice, praying, to be let in to redeem a previous mortgage, subsequently assigned to the defendant *Baker*; and that a posterior fraudulent sale to him might be set aside; and for an injunction of a pending action of ejectment.

The bill stated, that the plaintiff had advanced the defendant *Strong* 300*l.* on the security of certain freehold and copyhold property, at that time subject to a previous mortgage for 250*l.* by a term of one thousand years in the freehold, and a defeazible surrender of the copyhold,—that in consideration thereof *Strong* executed to the plaintiff a lease and release (30th and 31st *October* 1814) in fee of the freehold, and covenanted to surrender the copyhold, (the plaintiff being then and afterwards in possession, as lessee to *Strong*,) and that the deeds were afterwards enrolled in the manor court.

Soon after *Baker* (who was a relation of *Strong*) applied to him for a security on the premises so mortgaged, for certain money, which *Baker* claimed to be owing from *Strong* to him; and *Strong*, after some delay, at length (having first mentioned the mortgage to plaintiff, as a reason why he could not do so,) agreed to sell to

*Baker*

*Baker* the property for a nominal consideration of 500*l.*: with a condition, that he might be at liberty to re-purchase, on payment of that sum, with costs and interest; and, on 7th *November* 1814, he signed an agreement to that effect, but no money passed. In *January* 1815, the plaintiff's attorney apprised *Metcalfe*, the defendant *Baker's* attorney, of the mortgage to plaintiff, and shewed him the deeds, and gave notice to the first mortgagee not to allow *Baker* to redeem. *Strong*, on the 10th *January*, executed a similar security to *Baker*, to that which he had given the plaintiff; and on the 13th, the first mortgagee, notwithstanding the notice, executed an assignment (dated 3d *January*) of his term to *Metcalfe*, (*Baker's* attorney,) in trust, to attend, &c.; and, on the 23d, *Strong* surrendered the copyholds to *Baker*, who was then admitted. *Baker* then brought an ejectment, on the demise of *Metcalfe*.

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*Baker*, by his answer, denied being acquainted with *Strong's* affairs, or with the plaintiff's mortgage,—the claim by him of any debt,—and the alleged agreement; but he stated, that he had some time before become answerable for *Strong* to the amount of 250*l.*: and that *Strong* wishing to pay it, and wanting further pecuniary assistance, agreed with him (*Baker*) to sell, &c. for 500*l.*; and that, at the time of the treaty, *Strong* said, he had given A JUDGMENT, or warrant of attorney, to the plaintiff, for money borrowed of him, but that he had then no knowledge of the MORTGAGE;

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GAGE; and he (and *Metcalf* and *Strong*) admitted the other material facts charged in the bill, and that no money passed at the time of executing the deeds; but *Baker* stated, that he afterwards paid the whole to *Strong's* creditors, on his account.

*Dauncey* and *Treslove*, for the plaintiff, submitted that the questions were, whether *Baker* had had such notice, as that he ought to have ascertained what incumbrances there were on the property, or be bound by the prior charge: and whether he had had such notice in time. To support the affirmative of both those propositions, they cited, as to the first, *Allen v. Anthony* (a), *Daniels v. Davison* (b), and the cases there cited; and, on the second, *Tourville v. Nash* (c), *Story v. Lord Windsor* (d), *Maundrell v. Maundrell* (e), *More v. Mayhew* (f), and *Wigg v. Wigg* (g); and they contended, that under the dishonest circumstances of this case, the plaintiff was entitled to a decree, with costs.

*Martin, Wetherell*, and *Wakefield*, for the defendants, contended, that under the circumstances *Baker* had not sufficient notice, the plaintiff's possession being no more than that of any other tenant; and that if it should be considered that he had had notice, it was received too late, and that

(a) 1 Mer. 282.

(b) 16 Ves. 249. 17 Ib. 433.

(c) 3 P. Wms. 307.

(d) 2 Atk. 630.

(e) 10 Ves. 246—271.

(f) 1 Ch. Ca. 34.

(g) 1 Atk. 384.

he was not prevented by it from securing to himself a debt, previously due from *Strong*, or from purchasing the equity of redemption which *Strong* possessed, and acquiring, by redeeming the first mortgage, the legal estate. This being an equity of redemption only which had been purchased, distinguishes the present from the cases cited, the subject-matters of which were legal estates. All that was done by *Baker* in this case, amounted merely to a redemption of a first mortgage by a third mortgagee, without notice of the second, which, in equity, may be, and is constantly done.

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As to costs, they submitted that this being the case of a mortgagee, the defendants would be entitled to their costs, whatever might be the result of this cause.

RICHARDS, *Lord Chief Baron*\*, (having stated all the circumstances of the case with much particularity, both at the commencement, and in the other corresponding parts of the judgment,) observed; When *Strong* mortgaged the premises to the plaintiff, he was merely the owner of the equity of redemption, which he conveyed to *Taylor* by the deed of *October* 1814. Afterwards *Baker* proposed to purchase the property; and he admits, that during that treaty *Strong* informed him, that he had given the *plaintiff a judgment, or warrant of attorney*, so that he clearly had notice that some

\* The Reporter was not present when this judgment was delivered, but he has been favored with a short and accurate note of it, which may be safely relied on.

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 and others.

sort of security had passed from *Strong* to *Taylor*, and that was certainly such notice of an existing prior incumbrance, as should have put him on further enquiry. Soon after that the plaintiff's attorney shewed the deeds to *Metcalf*, *Baker's* attorney, so that, undoubtedly, the treaty and the purchase were completed after admitted notice. Then, *Baker* having procured the first mortgage to be assigned to him, the Court could not interfere to restrain him from getting the possession by law, because he had clearly acquired the legal estate.

On that part of the case, the rule certainly is, that between parties who have equal equity, whoever gets the legal estate shall be preferred: but then there must be equal equity, not only in their titles, but in the transactions on which their claims are founded. Here (it is true) both parties were equitable incumbrancers, but the plaintiff was a prior mortgagee: and though the defendant *Baker* had acquired the legal estate, it is clear that before taking his mortgage, and thereby getting the legal estate, he knew that *Taylor* had, at that time, an honest charge on the estates: and even had it been but a judgment, it would still have been a lien on the land, and therefore such notice of some species of prior incumbrance as would have bound the mortgagee, and it became *Baker's* duty to ascertain as he might have done the true state of the fact.

In

In all events, then, supposing *Baker* to have any right at all against the plaintiff, it could only be on the ground of the money (if any) which had been actually paid by him on *Strong's* account, prior to the 2d of *January*. But he would not be entitled even to that, if he had had, in point of fact, notice of the plaintiff's prior incumbrance, which I cannot but consider that he had; and I think that there is no difference in this case, in point of law, whether it were a judgment or a mortgage, and notice of one was equivalent to notice of the other.

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As to the costs, notwithstanding the rule, that a mortgagee generally is entitled to costs, yet when there has been unfair dealing, that forms an exception; therefore the defendants *Baker* and *Strong* must not be allowed costs.

The ejectment being founded on a legal right, I cannot restrain the defendant from proceeding. In all other respects I shall

Decree for the plaintiff,

With Costs.

*Coram*

*Coram* RICHARDS, L<sup>D</sup>. CH. BARON.

1818.

Tuesday,  
20th January.

RANDOLPH, Clerk, v. GORDON and others.

**Evidence.**

A document produced by a party as evidence in his behalf, must be accompanied by proof of the custody whence he derived it, to satisfy the Court of its authenticity; and if no such proof is given, (his own possession not being sufficient) it will not be permitted to be read, for want of its being shewn to have come from such proper custody, as would make it evidence.

**Deposition—**  
that a certain book (offered in evidence) belonged to the defendant,  
*F. Stanley,*

from whom deponent received it: and that he believed the whole of the writing in the said book to be of the hand-writing of *W. Stanley*, the grandfather of *F. Stanley*; (through whom the book was connected with the matter before the Court) and 'that the deponent was the better enabled to state of whose hand-writing he believed the said book to be, from his having compared the writing in the said book with the original will in *Doctors' Commons*, of the said *W. Stanley*, which appears to be wholly in his own hand-writing; and that he believed the said book, and the said will, to be written by one and the same person':—does not furnish such proof of the hand-writing of *W. Stanley*, as to be evidence that the book was, in point of fact, written by him; because the witness does not state that he has any reasons for believing, or means of knowing, that either the book or the will is of the hand-writing of *W. Stanley*, as from having corresponded with him, or having seen him write, &c.; for without such statements the testimony of the deposition is merely matter of inference in form, and does not warrant the conclusion in substance.

THE defendants in this suit for an account of the tithes of hay and grass, had set up two payments, as moduses, in their answer, by way of defence; and in proof of them offered, in evidence, a certain book, containing entries of customary payments made in the parish, in lieu of the tithes in question.

To establish the propriety of the custody of this piece of evidence, *Thomas Mott* (the defendant's attorney) deposed, that the book was the property of *Francis Stanley*, one of the defendants, and that he had received it from him.

And he also stated, as proof of the hand-writing, that he believed that the whole of the writing in the book was of the hand-writing of *William Stanley*, D.D. (the grandfather of the defendant,

defendant, *F. Stanley*), who had been, (as deponent was informed and believed,) rector of the parish from the year 1690 to 1723, or thereabouts; *and that he was the better enabled to state of whose hand-writing he believed the said book to be, from having compared the writing in the said book with the original will, in Doctors' Commons, of the said William Stanley, which appeared to be wholly in his own hand-writing, and that he believed the said book and the said will to be written by one and the same person.*

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*Dauncey* and *Boteler* objected to this document being read: 1st. its not having been proved to have come out of a proper custody, (there being no privity between the plaintiff and the party from whose possession it was produced) so as to make it evidence; and, 2dly, that the testimony to the hand-writing of *William Stanley* was deficient, because the witness had expressly grounded his knowledge on a comparison of the hand-writing in this book with that in a will, the hand-writing of which had not been previously proved.

*Fonblanque*, *Martin*, and *Palmer*, *contra*, denied that the witness had founded his testimony on the similarity of hand-writing in this book with that of *Dr. Stanley's* will, for he had only offered that fact as a corroboration of the testimony borne by him to its being of the hand-writing of the doctor; and they contended, that the effect of the primary testimony was sufficient to establish the fact, of this book having been  
 written

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 and others.

written by the hand of Dr. *Stanley*, and that it was as much as had ever been required in proof of the identity of hand-writing.

They cited a case from Justice *Buller's Nisi Prius* (a), where Lord *Hardwicke* admitted proof by similitude of the hand-writing sworn to by a witness, who had inspected parish books, for the purpose of comparing the writing in question with the parson's signature there. So in *Roe v. Rawlins* (b), the same sort of evidence was received by *Le Blanc, J.* In *Morewood v. Wood* (c), the similarity of a signature with the hand-writing of a will, was held to be sufficient proof. All writings, which are not considered as proving themselves, can only be proved, after great length of time, by such means as have been here resorted to, being the best evidence of which the nature of such documents is capable. To the same point, they mentioned a case of *The Earl of Egremont v. Lord Vavasour*, said to have arisen, some years ago, on the northern circuit, where books coming from a chest, in which the muniments of the manor were preserved, bearing intrinsic marks of having been written by a former steward of the manor, were received without further proof, in consideration of the impossibility of furnishing *better evidence* of the hand-writing at so distant a period.

As to the custody, they submitted that the possession of the book by *Stanley* was sufficient.

(a) P. 236.

(c) 14 East, 327, *in notis.*

(b) 7 East, 382.

And

And they cited the case of *Bertie v. Beaumont* (d), where a receipt was admitted in evidence, and was allowed to have come out of the proper custody under circumstances precisely similar, without any proof of the hand-writing, the Court holding that the person who possessed the receipt, being of the same name with the person from whom he derived it, and to whom it had been given, that they were so connected, as to make his the proper custody, and reasonable evidence of proper custody, is all that can be required, and is sufficient. Here it is in proof, besides, that this defendant is descended from the family of the owner of the book.

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RICHARDS, *Lord Chief Baron* (dispensing with the reply). There is no doubt that such books as these should, in all cases, be proved to have come from the proper custody: and to prove that, in this case, it was necessary to shew that the defendant *Stanley*, in whose possession it was, being the grandson of the former rector of that name, had found this book among his grandfather's papers. If that had been proved, the book, as far as relates to the question of custody, would have been admissible evidence; but that has not been done in the present case. It is said to have come from the custody of a person, who is one of the defendants, and a grandson of a former rector, and that he delivered it to his attorney, but where he himself got it from is not stated, and it might have been from Mr. *Martin's* library for any thing

(d) Ante, vol. ii. 307.

that

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that appears here. There are many cases in which books of this sort have been rejected, because they have not been proved to have come out of the proper custody; and I recollect a case in which a book was produced, as coming out of the *Bodleian* Library, but the Court would not receive it. The rule is the same, in regard to these books, as it is with respect to terriers, which must, in all cases, be shewn to have been produced from the proper depositories. I cannot, therefore, receive this book, coming, as it does, merely out of the custody of a defendant, without further evidence of the custody from which he also procured it.

Another objection was made to the proof of the hand-writing of the former rector in the book, by whom the book is said to have been written. If it were really written by him, it is certainly of great value, because books written by preceding rectors, are always admissible evidence against their successors. But how is the hand-writing of *Dr. Stanley* attempted to be proved? A book is produced, which we will say, for the sake of argument, was found in the street, and I am called upon to believe it to be in the hand-writing of the former vicar, because it is said to be very like it. I recollect many cases, in which I have myself been counsel, where books have been rejected, supported merely by the proof of the similarity of the hand-writing, to writings by the same person, although the resemblance had been proved in a tolerably

tolerably satisfactory manner; and certainly such loose evidence, if admitted generally, would let in great difficulty and inconvenience. In all cases, where such proof has been received, it has passed, *sub silentio*, in cases where no objection has been made to it; but, in the present case, the hand-writing is not proved, even by an apparent similarity; for what is the evidence? The witness, looking at the book, says, he believes it to be in the hand-writing of Dr. *Stanley*; not because, as a person residing at a great distance, he had ever been in the habit of corresponding with him, but because the hand-writing in the book is the same with that of his original will in *Doctors' Commons*, which, he only says, appears to be in the hand-writing of Dr. *Stanley*, and, as he believes, was written by one and the same person, and therefore he considers the will to be in the hand-writing of the rector; but he does not say what means he has of knowing that, either from having ever corresponded with him, or from ever having seen him write, or any of the usual sources of knowledge. Because, therefore, it is a will, and because it appears to have been written wholly by the same person, he ventures to swear that he believes it was all written by the testator; but we all well know, that there are very few persons who write their own wills themselves. All that could be deduced, with any correctness, from the facts stated by this witness is, that as the will appeared to be all in one hand-writing, he therefore concluded that some person wrote the

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whole of it, but not that that person was the testator himself. The person who wrote the will certainly may have been the person who wrote this book, but it does not follow that either was written by Dr. *Stanley*.

I cannot omit to observe, that the very terms of the deposition shew, that it was cautiously worded, and manifests an intention not to speak otherwise than doubtingly, and by inference. But it never can be inferred that a will is in the hand-writing of a testator, merely because it is his will, and therefore it is impossible that such evidence as this can be received as proof of hand-writing.

Evidence rejected.

*Coram*

*Coram* RICHARDS, L<sup>D</sup>. CH. BARON.

DREW v. S. B. HARMAN, I. HARMAN, and  
BERNARD.

1818.


Wednesday,  
21st January.

THIS bill stated, that *Petters Harman*, deceased, had, in his life-time, executed a bond to the defendant *Bernard* (and another person, since dead), for securing 500*l*. to be paid to them when *Elizabeth Day* (whom he afterwards married) should attain the age of twenty-one, upon trust, for the benefit of her and her children; and that he also delivered to them the title-deeds of certain freehold property, as a collateral security. *Elizabeth Harman* attained the age of twenty-one, soon after the execution of the bond. *Petters Harman* died without paying the money, having by his will devised his said freehold property to the defendants, *S. B.*, and *I. Harman*, and another person, in trust, to sell, and with, &c. to pay off the said bond; and he appointed them his executors. *I. Harman* proved the will, and with the consent of *S. B. Harman* (the other executor having re-

A purchaser of property, collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase-money, is not entitled to insist on having the property re-conveyed to him free from the incumbrance, before he pays the sum so secured by the mortgage: and if he file a bill to have the estate re-conveyed to him, and a declaration of the Court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered merely as a mortgagor, filing a bill to redeem, and must pay all the costs, although he have paid the money into Court.

An interlocutory order for an injunction, cannot be considered in argument as affecting the ultimate decision of a cause.

If there are *cestuis que* trust, who ought, in strict regularity, to be made parties to such a suit, and are not so brought before the Court, their interests may be ascertained and protected (by indulgence of the Court), by a petition to be presented by them for that purpose, to obviate further delay and expence.

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nounced), mortgaged the premises to the said obligees for 500*l.* The *Harmans* afterwards agreed to sell the premises to the plaintiff for 700*l.*,—to discharge the bond out of the personal estate of the testator—and to procure the title-deeds to be delivered up to the vendee; 500*l.* of the purchase-money was to remain in the plaintiff's hands, in the mean time, as a security, until the bond debt should be paid, a mortgage to be executed by him to them for that sum, and the plaintiff was, in the mean time, to be let into possession. The premises were accordingly conveyed to a trustee, for the plaintiff, in *October* 1807, and plaintiff executed the mortgage, and a bond for 500*l.*, to *S. B. Harman*, in *December* following, and paid 200*l.* *S. B. Harman* signed an undertaking, to procure the delivery of the deeds, and to pay off the original bond; and also gave his bond of indemnity against the misapplication of the money, but stipulating that the plaintiff was not to be thereby deprived of his right, to apply the mortgage-money for his protection, in satisfaction of the trusts.

The bill then averred plaintiff's readiness to pay, &c. *upon performance of S. B. Harman's undertaking, and a reconveyance, &c.*; and that he had offered, *on such conditions*, to pay, &c. But that *Bernard* (the surviving obligee) had claimed the 500*l.*; and the *Harmans* disputed his right, claiming the payment of plaintiff's bond to *S. B. Harman*, they refusing to procure the delivery of the title-deeds, and *Bernard* refusing

refusing to give them up, until payment to him of the 500*l.*; and that the plaintiff, therefore, knew not to whom to pay the 500*l.* but was ready to pay it into Court, for the benefit of the persons entitled.

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The bill then prayed a discovery of the persons entitled, &c. the plaintiff paying principal, interest, and costs, into Court;—that plaintiff might redeem, and defendants re-convey the premises; and that *the defendant, S.B. Harman, might be decreed to indemnify the plaintiff from all costs and expences of this suit, and otherwise incurred by him*, by reason of the premises aforesaid;—and that he might, in the mean time, be enjoined from further proceeding in the action at law, commenced by him on the bond.

The injunction was granted, as prayed.

The cause now came on to be heard, when *Fonblanque* and *Wray*, for the plaintiff, contended, that he ought not to be called upon to pay the money until the property was conveyed to him, freed from the incumbrance of the bond;—that the 500*l.* was a general charge upon the estate;—that the delivery of the title-deeds, and the payment of the purchase-money, were concurrent acts; and the defendant could not, by any proceeding, have compelled payment of the 500*l.* till they had delivered up the title-deeds;—and that the plaintiff was entitled, under such circumstances as affected this case, to indemnify himself

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by the sanction of the Court, through the medium of such a proceeding as the present bill, and so the Court must have thought, when they granted the injunction.

[The *Lord Chief Baron*. I wish it to be understood, that the circumstance of an injunction having been granted, is not to be considered (as I observe it frequently is in argument) as any thing like an indication of an opinion of the Court on the merits of a cause. An injunction is but an interlocutory order, made for the sake of security, and very often the Court, as will most probably be the case here, ultimately decides exactly the other way.]

They then submitted, that the money, which was the consideration of the contract, having been paid into Court, it ought not to be parted with till the purchaser had got possession of the title-deeds, and till the defendants had shewn who were actually entitled to receive the money; and that where so many claims were set up, whereby this bill was made necessary for the plaintiff's security, he ought to be allowed his costs, and the more especially, as the payment of the purchase-money into Court ought to be considered as equivalent to a tender.

*Dauncey, Wingfield, and Lovatt*, for the defendants, admitted that the plaintiff, as mortgagor, was entitled to file a bill to redeem: but, they submitted, that it must be on the usual terms of  
payment

payment of costs; and they contended, that notwithstanding the rather peculiar circumstances of this case, the plaintiff was not entitled to any extraordinary interference of the Court.

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RICHARDS, *Chief Baron*. It is admitted, that all debts have been satisfied, except this 500*l.* and I have no doubt that that sum was a charge upon the real estate; I shall, therefore, not dispose of the purchase-money, till I know who has an equal charge. I shall then order the title-deeds to be delivered up, on payment of the remainder of the purchase-money to the persons who shall be entitled to it. It then becomes a mere question of costs, which I shall certainly not make this estate pay.—[His Lordship then went into the general facts, saying that this was, in effect, a bill by a mortgagor to redeem, who, generally speaking, pays costs.] The duty of the trustees under the will was clear, and they, as they were directed, have sold the property. A general arrangement was made between all the parties. The surviving obligee had a right to receive the 500*l.* and he would become a trustee for the persons, for the benefit of whom the bond was given. *Bernard* having knowledge of the arrangement, and having approved it, *Drew* had nothing further to do than to pay *Harman* the money; but now having filed this bill, as mortgagor, it is impossible to say that he should not pay the costs.

That which has been stated for the plaintiff,  
 Y 4 that

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that the mortgage-money ought not to be paid before the title-deeds were delivered up, making that a *sine quâ non*, is a proposition that cannot be maintained, for a vendor may refuse to execute, without the consideration being paid. As to the effect of a tender, it is sufficient to say that none has been proved; and it may be also observed, that a tender in equity is a very different thing from a tender at law.

The order to be made, therefore, will be, that it be referred to the Deputy Remembrancer to tax the costs of this suit of the several defendants, and also the costs of *S. B. Harman* at law, and that they be paid by the plaintiff; and, on payment, *S. B. Harman* to re-convey the mortgaged estate to plaintiff, at his expence; and *I. Harman* and *S. B. Harman*, and *Bernard*, to deliver up, on oath, all deeds, &c. in their custody, to the plaintiff.

[His Lordship afterwards observed, that in strict regularity the *cestuis que trust* should have been made parties to this suit; but to obviate that difficulty, without further delay or expence, he recommended a short petition to be considered of, on the part of the widow and child, that their interest might be ascertained, and their rights protected, and ordered the cause to stand over, *pro formâ*, in the mean time, with liberty to present such petition; which being afterwards presented, stating, in substance, the above facts, the money

money in Court was ordered to be transferred to them, in due proportions—the costs of the petition to be borne by themselves.]

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and others.

Decree accordingly.

WRIGHT and others, v. BELL.

1818.

Wednesday,  
31st January.

THIS was a bill, filed (*Mich. Term 1811*) by the assignees of a bankrupt, and the bankrupt, to compel the specific performance of a contract for the purchase of a debt, due to the bankrupt before his bankruptcy, and his then partner, from a merchant resident at *Demerara*, since deceased.

The Court will entertain a suit for the specific performance of a contract, for the purchase of a debt. It is within the exception to the rule, that Courts of Equity will not compel specific performance of contracts for the sale of personal chattels.

The bill stated, that the plaintiff, *Compton* (the bankrupt,) and *Pourtales*, (who resided abroad,) carried on business in partnership together, in *London*, as merchants;—that, in 1806, *Compton* (*Pourtales* being out of the kingdom) was duly declared bankrupt, and the other plaintiffs were chosen his assignees;—that at a meeting of the partnership creditors (12th *November 1808*) it was resolved, that the outstanding debts should be sold, and amongst others the debt in question, due from the estate of *Lespinasse*, a *West India* merchant;—that the defendant proposed to purchase it, and authorized his managing clerk, *David Milne* (who was the executor of *Lespinasse*) to treat for it;—that he (*Milne*) having ascertained the balance to be 550*l.* agreed, on the part of the defendant,

Doubts as to, and the proper mode of assignment, referred to the Deputy Remembrancer.


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defendant, to give 500*l.* for it, as would appear by his letter (2d *June* 1809) to the plaintiffs on the subject, to (which they referred);—that the plaintiffs then caused a deed of assignment to be prepared, and submitted to the defendant's solicitors; who, after making some slight alterations in it, returned it to the plaintiffs with a note, stating, that they considered that the plaintiffs had no right to transfer more of the debt than *Compton's* share, without *Pourtales* joining in the assignment; when plaintiff *Compton* having then obtained his certificate, agreed to indemnify the defendant, which his said solicitors accepted, and inserted a covenant to that effect in the draft, and returned it approved.

The defendant, by his answer, admitted, or did not deny any of the circumstances stated, the main facts on which the bill was founded, except as to the proposal having originated with him, but said that it was made by the plaintiff *Compton* to *Milne*, who the defendant admitted acted as his agent in the treaty; but he submitted, that as plaintiffs could not make a complete title to the whole debt without *Pourtales*, he was not, therefore, bound to purchase;—and he stated, that he never intended to accept *Compton's* indemnity, but that on having a complete assignment of the whole debt, he was still ready to give the 500*l.* for it.

By an amendment in their bill the plaintiffs stated, that to obviate all difficulty they had procured

cured an assignment (dated *May* 1811) from *Pourtales* to the assignees, of his share of the debt, and that he had constituted them his attorneys.

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*Dauncey* and *Girdlestone*, for the plaintiffs, (having adverted to the facts and dates,) submitted that the present was a valid, equitable agreement, for the assignment of a debt, and one which a Court of Equity would enforce; that this was a *chose in action* of an assignable nature, and the consideration was fair. The facts being established, they observed, the only question before the Court was, whether this is a contract of such a description as the Court will recognise, to be one of those which they will order to be carried into execution; and they contended, that though there might be no case precisely applicable to the present, it was, nevertheless, within the governing principle, on which, on all other occasions, the Courts had interfered to assist a party, on a bill for the specific performance of an agreement.

*Agar* and *Roupell*, for the defendants, (having observed that this was a case of much novelty, and great importance,) acceded to the facts as stated, for the sake of argument, and in order that the question might be as fully and fairly discussed as if it had arisen on demurrer.

Admitting that a debt was assignable in equity, they insisted that the plaintiff's source of redress was purely legal, and that a contract for such an assignment as was now in question, was one of which

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which a Court would not compel a specific performance. This being the case of a chattel, the general rule is against the plaintiffs; for, in all the cases on the subject, it has been held that the remedy for non-performance of such contracts as these, is properly by action at law, for damages, and therefore Courts of Equity have not jurisdiction, and cannot interfere to order the parties to carry them into execution. And they cited *Dorison v. Westbrook* (a), *Capper v. Harris* (b), *Cud v. Rutter* (c), *Douglas v. Vincent* (d), and *Pearne v. Lisle* (e).

In *Burton v. Lister and Cooper* (f), which was the case of a contract for the purchase of timber, Lord *Hardwicke* goes fully into the doctrine, and declares the rule to be, that bills for the performance of contracts for the sale of a chattel, could not be retained by a Court of Equity, and that the party should be left to his remedy at law. The reason there given is, that contracts for the sale of stock, corn, hops, &c. vary according to different times and circumstances, so that parties might be ruined by a suit in equity, when in a court of law, perhaps, only a shilling damage might have been recovered. If that doctrine applies to goods, *a fortiori* will it to cases of this sort, where the daily accidents affecting the credit

(a) 5 Vin. Abr. 540, pl. 22.

(b) Bunb. 135.

(c) 1 P. Wms. 570; cited also in 5 Vin. Ab. 538-9-40, pl. 21, (where it is called *Cud-dee v. Rutter*), and in *Mussell v.**Cooke*, Pr. in Ch. 534, (there called *Sould v. Butter*), and 2 Eq. Ca. Ab. 18, pl. 8.

(d) 2 Vern. 202.

(e) Amb. 75.

(f) 3 Atk. 383.

and

and solvency of parties, subject such contracts to fluctuation in value.

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[*Lord Chief Baron.* That objection, I take it, would apply equally to contracts for the purchase of land, which sinks and rises in value in an extraordinary manner. We all know very well that the same quantity of land was worth very considerably more four years ago, than it is at the present time.]

In the case of land the distinction is, that the specific thing can always be given. Here the Court cannot give the thing demanded, which is a debt: it can only give what will confer a right of action. This is not a contract executed, but merely and peculiarly executory. Nothing has passed in writing between the parties: no act has been done on either side. The Court is therefore literally called upon not to compel the performance of a contract, but to compel the parties to contract, and that founded on what may be considered as merely conversation.

Then it is obvious, that the Court could not effectually decree what is prayed. To give the defendant a title to sue at law, *Pourtales* must be ordered to permit his name to be used, and the Court cannot make any such order against him, who is not a party to the suit, and is resident out of the jurisdiction.

Adverting

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Adverting to the dates, they argued *ab inconvenienti* against the interposition of the Court in cases of this sort, submitting that in the lapse of time the party may have become insolvent; or the Court might be called on to entertain such suits, in cases where the debt might be barred by the statute, before a decree could be obtained.

*Dauncey*, in reply, submitted that the real question was, whether the Court can interfere in this case, and order the assignment prayed? The novelty of the case furnishes no objection to it; on the contrary, it fully justifies the bill. In the case of *Burton* and *Lister*, which was quite a new case, the principle was admitted generally by the Chancellor, that bills of this nature might be entertained. In this case the party has no remedy at law, and that it is which forms the ground of his equity. Lord *Hardwicke* said, in *Burton* and *Lister*, that he would decree a specific performance of an agreement between two persons, to carry on a trade together, *notwithstanding it is in relation to a chattel interest*. The decision in that case is therefore entirely in favor of this bill, and as the engagement between the parties is completely proved, performance of the contracts ought to be decreed.

RICHARDS, *Lord Chief Baron*. I certainly do not remember any case of this description before. I acknowledge the principle of the decision in *Burton v. Lister*, which has been quoted by the  
counsel

counsel for the defendant. My only doubt is, whether this case does not come within the exception. As to the other cases, I do not think they have much application.

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This contract was made in 1808, by the defendant, through the medium of *Milne*, and his acts were undoubtedly binding on the defendant. He agreed to purchase the debt for a sufficiently ample consideration, where any doubt existed about it. All that was wanted to enable the purchasers to assert their claim of this debt was, the authority to use the plaintiffs' names. Now there is not the least suggestion, that any difficulty was thrown in his way by them, as that they had been required to permit their names to be used, and had refused. It does not even appear that the defendant applied to them for that purpose: he was completely quiescent; and if he did not use diligence, what right has he to complain of the consequences of delay. It is not at this moment suggested, that there is any doubt about the debt being recoverable. One party agrees to purchase the debt, and the other agrees to give the best assignment they can, and they can now make a perfect assignment.

But the nature and object of the bill, and its principle, is what has been chiefly objected to in argument. It is said, that the contract is not for the payment of money, but to enable the party to recover a debt. So it certainly is: and then the question is, whether this Court can and ought to assist

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assist the plaintiff in such a suit? And, on the present answer, I think the case is brought within the exception noticed in the case of *Burton v. Lister*, and that the Court may make such a decree. [His Lordship read the admissions from the answer, that the defendant had acceded to the proposal of purchasing the debt.] The only object of dispute then was the assignment, and it seems that now, the plaintiffs are enabled to furnish an effectual assignment. I, however, cannot order a complete assignment to be made, without a reference; therefore the parties must go before the Deputy Remembrancer, and if he is of opinion that an assignment can be made, he must also prepare the draft, which is all that I can order.

On this answer I cannot compel the defendant to receive the assignment, when made, unless there be an existing debt, which is not admitted: and that must also be referred to him, to ascertain the fact.

Decree accordingly, and

Reference ordered. .

END OF SITTINGS AFTER MICHAELMAS TERM.

REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF EXCHEQUER,  
AND  
EXCHEQUER CHAMBER.

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HILARY TERM,—58 GEO. III.

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MEMORANDA:

SIR *William Grant*, during the vacation, retired from the profession, having resigned the office of Master of the Rolls; and was succeeded by

Sir *Thomas Plumer*, Knt. Vice Chancellor of *England*: when that office was conferred on

Sir *John Leach*, Knt. one of his Majesty's Counsel in the Law, at that time Chief Justice of *Chester*, and Chancellor to His Royal Highness the Prince of *Wales*.

This Term *William Draper Best*, Esq. one of the King's Serjeants, resigned the office of Attorney General to his Royal Highness the Prince of *Wales*, and was appointed to that of Chief Justice of *Chester*.

1818.

Wednesday,  
28th January.

## STEVENS v. ALDRIDGE.

*Semble.*—A farmer claiming the exemption (under the custom) from tithes for green-cut food applied for foddering husbandry horses, must shew that such horses were *bonâ fide* used in husbandry, and that he had no other sustenance (of any sort) for them on his farm.

Both those points are questions of fact, and the finding of the jury is conclusive.

The amount of the tithes sought to be recovered being small is a ground for refusing a new trial, or, at least, a second new trial.—*Garrow, B.* *dubitante* on a question like the present, in an action affecting a right, and likely to be of frequent recurrence, and therefore important in the first result.

THIS was an action brought by the plaintiff, who was farmer and lessee of the tithes of part of the parish of *Cookham*, against the defendant, the owner and occupier of a certain farm, called *White Place*, for 6*l.* 10*s.* (the single value,) for not setting out the tithes of clover and vetches, under the 2d and 3d *Edw. VI.*

The first count of the declaration stated the plaintiff to be *owner and proprietor* of the tithes; and the second, which was the common *indebitatus*, farmer and proprietor.

The defendant pleaded the general issue.

The cause was tried at the *Lent Assizes* for *Berks*, in 1817, before Mr. Justice *Park*; when it appeared from the evidence, (the plaintiff having put in and proved his lease of the tithes,) that the defendant had had more *hay* on his farm than was sufficient for the sustenance of his horses, (ten in number); but that he had, notwithstanding, cut clover and vetches green, with which he had fed them all. It was also proved, that the defendant was in the habit of occasionally using his horses in towing barges for hire on the river *Thames*; and that he had given the

*Semble.*—A lessee and farmer of tithes declaring as owner and proprietor, is bad.

Husbandry horses being used occasionally by the farmer for other purposes, or for other persons, does not deprive the farmer of his privilege of exemption, where he would be otherwise entitled to it.

horses

horses *so employed* clover and vetches, cut green, for fodder.

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The defendant offered no evidence; and his Lordship, on that case, directed the jury that there were two points for their consideration: first, whether there was on the defendant's farm a sufficient quantity of other sustenance for the support of his husbandry horses, without having recourse, of necessity, to the green fodder; and, secondly, if there were not sufficient sustenance, whether the horses which had been fed with such green fodder were husbandry horses, and used solely for purposes of agriculture; that if either of those considerations were negatived, the plaintiff would have a right to recover in this action, because, in either case, the defendant would not be entitled to claim the right of exemption insisted on; and his Lordship stated further, that he was himself of opinion, that neither ground of exemption was made out by the evidence, for that the horses having been proved to have been worked in towing barges on the river, deprived the defendant of the privilege afforded to the employer of horses *in husbandry*, to feed them on the green-cut fodder, without paying tithes; and that there having been other sustenance *of any sort* on his lands at the time, (of which there had been proved to have been considerable quantities,) would have taken away the defendant's right, even if he had been entitled to it on the other ground; but notwithstanding that

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direction,

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direction, the jury found a verdict for the defendant\*.

*Dauncey* applied for, and obtained an order *nisi* for a new trial, in the following *Easter* Term, on the objection to the verdict, that it was contrary to the evidence, the law, and the express direction of the judge.

Cause having been shewn, the Court made that rule absolute.

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The action was then tried a second time at the next assizes, before the same judge, and a jury, composed of three special jurors, and the remainder supplied by a tales prayed by the plaintiff, when the evidence was more fully gone into, and the defendant also examined witnesses on his part.

The plaintiff then proved, in addition to the evidence given on the former trial, that the defendant, on the failure of one *Shepherd*, who had kept horses for the purpose of towing barges on the river, had bought his stock of horses, and taken up the business of letting them out for that purpose, in which they were more frequently em-

\* The verdict which the jury had brought in, in the first instance, was 'for the defendant, he paying the plaintiff 5*s.* in consideration of the green fodder given to the horses employed in towing the barges;' but that verdict being rejected, they then found for the defendant generally.

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ployed than on the farm; that he occupied a larger quantity of grass and meadow land than arable on *White Place Farm*, (seventy-five acres of meadow and green food, and seventy acres of arable and corn land,) and that the defendant had sold and bought considerable quantities of hay; in short, that there was a sufficient quantity of *other* food on the farm, to prevent any necessity of resorting to the green meat.

On the part of the defendant it was proved, that the same horses worked sometimes on the farm, and sometimes in towing barges.

On that second trial (as appeared from the learned judge's report, which was now read by *Garrow*, Baron) the jury were directed as on the former occasion, but they again found a verdict for the defendant.

A rule to shew cause why there should not be another trial, having been obtained,

*Jervis*, and *Taunton*, *W. E.* now shewed cause. They took a preliminary objection to the declaration in the action, which they contended was bad in the description of the plaintiff, as *owner* and *proprietor* of the tithes, whereas, in fact, he was proved to be *lessee* and *farmer*; and submitted, that if the plaintiff were not bound so to describe himself as should accord with his true title, and should obtain a verdict as owner and proprietor, he might, notwithstanding, afterwards, on some

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other occasion, sue the defendant as lessee and farmer; and he would not be precluded, by the result of the present action, from recovering, as the defendant could not plead a verdict recovered by one in one right, to an action brought by another in a different right.

[GRAHAM, *Baron*. That might, perhaps, be a ground for granting a new trial, if the *plaintiff*, and not *you*, had succeeded; but that is not so in this case, and it is surely not a reason for you, the defendant, to urge, particularly on this application (the objection not having been taken below,) why the plaintiff should not have a further investigation on the merits.]

[WOOD, *Baron*. There have been many instances of new trials being refused, where a fatal objection appeared on the record.]

[GARROW, *Baron*. They would otherwise go down to trial at the peril of a nonsuit.]

But the main question, they admitted, was, whether the defendant was bound to shew by evidence, in his defence to this sort of action, that he had not on the farm a sufficiency of *any sort of fodder, dry or green*, for the horses employed on that farm; or whether he would not be entitled to the benefit of the exemption, if he had not a sufficiency of *grass*, or of *meadow and pasture*, for them, whatever quantity of dry fodder he might have had besides; or whatever quantity  
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he might have sold or bought. And they cited *Watson's Clergyman's Law*, (page 552,)—a book (they observed) allowed to be cited,—to shew that proof of the latter was all that was necessary to exempt such green fodder, so cut and given to husbandry cattle, from tithes. In that book the position is, that 'if a farmer do cut down his grass, and only doth put it into swarths, and then carry it away, and doth give it green to his own cattle for their necessary sustenance, not having *grass* sufficient to maintain them otherwise, no tithes shall be paid thereof;' and the author refers to the case of *Crawley v. Wells (a)*, in support of that doctrine. They also cited the case of *Perry v. Soam (b)*, where the Court held such a prescription good.

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They also submitted that the law, as laid down by the learned judge, which was represented to be taken from a *dictum* of *Toller*, was incorrect in principle, for it could not be supposed that a farmer may not sell his hay made on his farm, without losing the benefit of the exemption given him by the custom. Hay, besides, pays tithe, whether given to husbandry horses or not; and if the farmer have made the grass growing on his farm into hay, for sale or home consumption, instead of giving it cut green to his husbandry cattle, it would be strange to say, that *therefore* he shall not claim the exemption which the green fodder would otherwise have borne, if it had been

(a) 1 Rol. Abr. 645, pl. 5.

(b) 2 Leon. 27, and Cro. Eliz. 139.

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so cut and given, and had not been suffered to have ripened into a titheable article.

Anticipating the case of *Mantell v. Paine* (c), they contended that that decision does not decide the point which it was said to involve, as bearing on this question: for in that case the attention of the Court was not called to the distinction now taken; and they submitted, that if that distinction were not admitted, the doctrine would go to exclude a farmer who purchases hay, and brings it home: he would be deprived of the exemption, although he might have bought it merely to sell again, which would defeat the beneficial enjoyment of the custom.

They then adverted to the evidence given on the trial, and drew the consideration of the Court to the testimony of certain of the defendant's witnesses, who proved that the defendant had purchased and brought to the farm more hay than he had sold off it; that he had not had more than ten horses at any time on the farm, six of which had belonged to *Shepherd*, and those six had not been fed with the tares, and that four horses were necessary for working the farm, and that they did not do the less work on the farm in consequence of their occasional employment in drawing the barges on the river.

On the whole they contended, that the points of the cause were pure questions of fact, and de-

(c) 4 Gw. 1504. and 4 Wood. 561.

pended entirely on the evidence: and were, as such, therefore, properly left to the jury, who were the fittest judges of the question, whether the horses so fed were *bonâ fide* husbandry horses, and whether it was according to the due course of husbandry, that they should have been foddered with tares.

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They ultimately submitted, that at all events the plaintiff ought to pay the costs, according to the rule which prevailed in all the courts, in cases of applying for new trials; and they urged also, that the smallness of the sum in demand was a reason why this second new trial should be refused, citing *Roberts v. Karr* (*d*), where the Court of Common Pleas said, they would not grant even a first new trial for so trifling a sum as 5*l.*: and that this was, moreover, a *penal* action.

Owen Sir *William*, in support of the rule, first submitted, that although this were the second motion of the same kind, and was an application for a third trial, yet, according to the practice and usage of all the courts, there was no definite limit assigned to the number of new trials which might be granted in the same cause, on good grounds, as where a jury, from perversity or prejudice, find verdicts contrary to the opinion of the judge, on a point of law; and he cited the case of *Bird v. Appleton* (*e*), as an instance, where a case was on such grounds sent several times to a jury. He

(*d*) 1 Taunt. 504.

(*e*) 8 T. R. 562.

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adverted also to a *dictum* of Lord *Ellenborough*, in a case argued before his Lordship at a recent sittings at *Guildhall*, where, he said, that he would never suffer a jury's caprice to work injustice, through the medium of a trial. And as to the objection of the smallness of the amount of the sum sought to be recovered, he contended that it had been frequently held, that that did not apply in cases where a verdict had been found against *law*. In *Tindal v. Brown* (f) the Court said, that 'though it was a rule in general, the Court would 'refuse to grant a new trial where the sum in litigation was small; yet that the rule did not apply, where a verdict had been given against law.' He adverted to the fact of the jury, on the first trial, having in effect originally found a verdict for the plaintiff in special terms; and suggested, that their refusing to find generally for the plaintiff at last, was on account of the costs. In this very case also, the Court had not thought on the former application, that the objection now made on that ground was available.

It was then pressed on the Court, that another urgent reason why the plaintiff, if entitled to it on the merits, should have a new trial, notwithstanding the smallness of the sum, was, that this was a trial of a right, and would, in its ultimate determination, be of great and serious consequence to the plaintiff, who had taken the tithes of a large district at a very heavy rent.

(f) 1 T. R. 171. and *Metcalf v. Hall* (there cited).

As to the present being a penal action, it was observed, that that was a mere formality in such cases, where the party seeking to recover tithes, had no other mode of trying his right to them at law.

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On the main point of the claim to the exemption insisted on, it was put, that it was an exemption founded on custom, and ought to be strictly proved. *Com. Dig. Tit. Disme*, H. 1. *Meade v. Thurman* (g). *Toller on Tithes*, p. 83. [The Court refused to admit that treatise as an authority, where it was not borne out by decisions.] And they contended, that even then it was necessary that the party claiming it should shew, not only that the horses were wholly employed in husbandry, but, in the exact words of the case of *Wells v. Crawley*, as given in *Roll's Abr. Tit. Disme* (Z), pl. 7. p. 645. and not as altered by the reference in *Watson*; that it should be given to the cattle for their *necessary* sustenance (the farmer), not having *sufficient* for their sustenance *otherwise*; and they cited the case of *Mantell v. Paine* (h), where this Court, by having ordered it to be referred to the Deputy Remembrancer, to enquire whether *Yalden* (one of the defendant's there) had sufficient *fodder* to support his cattle used in husbandry, without the green fodder in the pleadings mentioned, must have been of opinion that both those facts were necessary to be proved, to give him a

(g) Cro. Car. 303.

(h) 4 Gw. 1512, and Wood's  
 Tithe Decrees, 566.

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right to the exemption claimed, and that, because it was founded on the consideration of the benefit derived to the husbandman, and consequently to the tithe owner, from the labour of the cattle on the farm, from whence the tithe arose; and he submitted, that neither of those material circumstances had been proved, but, on the contrary, that they had both been negatived by the evidence in this cause, and that, therefore, the defendant had failed in his plea of exemption on that ground.

On the question of costs they insisted, that the plaintiff was entitled to have a new trial, if the Court should be of opinion that the rule ought to be made absolute, without costs; for where the verdict is against the justice of the case, and the direction of the judge, where that direction was right, the Courts have always granted new trials, without compelling the party applying to pay costs. *Edie v. East India Company* (i), and *Jackson v. Duchaire* (k).

To the last point made they answered, that a *lessee*, or *farmer* of the tithes, was an owner or proprietor, within the meaning of the statute, (2d and 3d *Edw. VI. c. 13. s. 1.*) and that such words are expressly used, in contradistinction from parson or vicar. The words of the statute are, 'No person shall carry away any tithes, before

(i) 2 Bur. 1224; and 1 Bl. 206, and 670. (k) 3 T. R. 551.

' they

‘ they are set out, or he has otherwise agreed for  
 ‘ the same with the parson or vicar, or other  
 ‘ owner, proprietary, or fermor of the same  
 ‘ tithes;’ that every person entitled to take the  
 tithes was, in fact, owner of them for the time  
 being, and they are his property. It has been  
 determined, in the case of *Sanders v. Sandford* (l),  
 that as actions on this statute are founded on a  
 tort for not setting forth tithes, for which the  
 plaintiff demands the penalty, he need not make  
 a title, and that it is sufficient that he bring the  
 action as *firmarius vel proprietarius*, without  
 shewing any particular title. In *Wheeler v. Hey-*  
*don* (m), which was also an action on the same  
 statute, the plaintiff declared on a lease of the  
 rectory for six years, if the parson lived so long,  
 and continued parson there, the latter condition  
 not being in the lease, and it was held no variance,  
 because it was implied by law; and, that because  
 ‘ *the lease is not the ground of the action*, nor is  
 the declaration founded upon the lease, but *upon*  
*the carrying away the tithes*, and for remedy of  
 the wrong was the action brought. The allega-  
 tion of the lease is but an inducement to the  
 action; and the jury, finding that he hath *a good*  
*lease, and a good title*, to ground his action, al-  
 though it be not in the same manner precisely as  
 he declares, it being found for the plaintiff, he  
 shall have judgment.’ So in *Babington and Wife*  
*v. Matthews* (n), which was an action of debt on  
 this statute, after a verdict for the plaintiff on *nil*

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(l) Cro. Jac. 437.

(m) Ib. 328.

(n) 2 Bulstr. 223.

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*debet*, it was moved, in arrest of judgment, that the declaration was not good, because the husband claimed the tithes in right of his wife, and in the declaration averred the life of his wife, but did not shew *how* he had the same. The answer was, and *Man*, Secondary, informed the Court, that to say generally, *possessor, occupatur, firmarius*, or *proprietary*, good and sufficient pleading on the statute 2 *Edw. VI.* and so it had been adjudged. *Coke*, and the whole Court, held the declaration good, because that was but an inducement to the action, and judgment was given for the plaintiff. And in *Campion v. Hill (o)*, the plaintiff shewed that the vicar had demised to him by leases, and he so being PROPRIETARIUS of the tithes, defendant carried away, &c. and held good, because (as was said) it sufficeth generally to shew, that the plaintiff is *firmarius* or *proprietary* of the tithes, without saying of what title, for this is a personal action, and founded on contempt of the statute. *S. C. Champernon v. Hill*, Yelv. 63. If, therefore, (he submitted,) proprietor be a sufficient designation of the person suing, the word *owner* might be rejected as surplusage. For these reasons he urged, that this rule ought to be made absolute.

GRAHAM, *Baron*. The first question, now made, of the plaintiff having subjected himself to be nonsuited, for want of a proper description

(o) 2 Vin. 44. Actions, Joinder, U. (a), pl. 48. and 9 H. 73. Dismes, II. (b), pl. 5, *in notis*,

where the cases cited above are referred to.

of

of himself in his declaration, was not sufficiently made the subject of consideration on the former occasion. It appears to me that it was necessary, in declaring upon this act for the plaintiff, to state on the record the specific character in which he sued, as whether it were ecclesiastical, or lay, original, or derivative: for a man cannot sue for tithes claimed under a lease without shewing it, and if he were allowed to state his title generally, no plaintiff so circumstanced would ever declare as lessee, in order that he might avoid the necessity of producing his lease. Therefore, I think, that he has not stated his title sufficiently, with reference to the words of the statute; and it would be quite nugatory for us to send down the record, with such a fatal defect upon the face of it.

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Then there was another point raised, on this application, of great nicety, and of some difficulty certainly, on which I will say a word or two, although I do not mean to give any decisive opinion at present; for it is not on that point that our opinion,—that this rule should be discharged,—proceeds; yet as there are several other objections, each of which would be alone decisive, and, as other cases may occur of the same nature, it may be useful to parties so circumstanced, to say something on the legal question, (however cursorily) for the purpose of intimating the understanding which I have of it. I therefore think it right to express my sentiments upon it, though somewhat doubtingly, on the present occasion: I speak of the question of the exemption claimed by the defendant for tithes, for green food

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food cut to fodder his horses employed on the farm. We have been referred to old cases, to shew that the learned judge who tried this cause was wrong in the law which he propounded to the jury, at *Nisi Prius*, in his direction to them in this case, as to the exemption from tithe of tares cut green, and carried away, to be given to husbandry horses in stating that it must be considered as confined to cases, where the farmer has no *other fodder of any kind* for the sustenance of the horses *bonâ fide* employed on the farm. Now, I certainly agree with *Watson*, (whose book is entitled to be considered as a book of authority, and is, out of respect, permitted to be cited,) on the main point of the position stated by him, yet it is clear that he goes a much greater length, than the principal case in *Roll*, from whence he took the doctrine, warrants; for it is observable, that though *Watson* uses the word 'grass,' *Roll* himself (who is always most singularly accurate) does not introduce that word in his report of the case, cited as the authority for the proposition, which makes a most material difference. [His Lordship read the case, as stated in *Roll*.] That single word omitted, makes this case most favorable to the plaintiff; but, inserted, the case bears the other way. I think also, that the determination in *Mantell v. Payne* to the same effect—that the farmer must be shewn to have no other fodder—is right; at least, that is the inclination of my opinion at present, (and, in that case the reference as to that fact, was directed after mature deliberation,) for I think that it is incumbent

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on the party claiming the exemption to shew that there was not enough, not of grass merely, but of fodder, of the general produce of the farm, and therefore, on that point, I think my brother *Parke* was quite right in his direction to the jury, and were it otherwise, clergymen would often be but badly situated.

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But the great difficulty with me in the present case is, whether it is possible, after a verdict found for the defendant on the first trial, without any evidence having been given by him—so that it might have borne some appearance of a verdict against the evidence, as well as against the direction of the judge—and a new trial having been awarded on that ground, when another verdict was found for the defendant on questions, which I cannot but consider as questions of fact, on such second trial, (wherein evidence was given on both sides,) and that on a claim, the importance of which, in point of amount of value, is so trifling, (the value of the tithes being only 2*l.* 9*s.*;)—my doubt (I say) is, whether it is possible that, under those circumstances, we can send the same case down to be tried again, for the third time. And I am of opinion that, on the evidence, we ought not.

There is, besides, really too much uncertainty about the facts of the case, to warrant us in saying that the jury were wanton of their jurisdiction, in finding for the defendant, and I have certainly great doubt on the evidence. There was some puzzle as to the horses used on the farm, and

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those employed with the barges; and notwithstanding, that it was inferred that the husbandry employment was only colorable, (which would, without doubt, be a fraud,) yet if the jury find that it were not so, that should be conclusive. Sending his husbandry horses occasionally to work the barges, would not deprive the defendant of his privilege of exemption, for there is no farmer who does not employ his team on other jobs besides his own farm-work incidentally, and they have clearly a right to do so.

[His Lordship having pointed out more minutely the contradictory results of the evidence,] added, Then the question ultimately comes to this, whether the defendant had or had not fodder enough on his farm to sustain his cattle, without cutting and giving the green food to them for their necessary sustenance. And that is one which ought not to be weighed too nicely: for if he shews (as the jury seem to have thought the fact was) that he bought more hay than he sold, it might be sufficient; and if that were not fully and satisfactorily proved, yet where there was not a gross and palpable case, it would not be enough to call on us to impeach the verdict of a second jury, by granting a third trial.

Then the smallness of the amount of the value of the tithes sought to be recovered by this action, is another, and would perhaps alone be a sufficient reason for our refusing the extraordinary interference of sending this cause down to be tried a  
third

third time. At the same time, the plaintiff is clearly entitled to his tithes, unless the exemption be fairly made out. As to the authority of the cases in the Court of King's Bench, (*Tindal v. Brown*, and *Metcalf and Hall*,) where it was said, that the cause had been sent down over and over again, till the jury came to a right conclusion, the question there was, whether the notice given of the dishonour of a bill of exchange was reasonable notice, and that was clearly, a pure question of law; and for the sake of certainty in commercial matters, juries should not be suffered to trifle with established and settled questions. This, however, proceeds rather on questions of fact: and whatever points of law may have been discussed in the course of the argument, it was not on the law that the verdict rested; for it depended on the finding of the jury, whether those points would arise in this case or not, and therefore I think this rule should be discharged.

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WOOD, *Baron*. I am of opinion, that there ought not to be another new trial in this case. There have been two trials had already, and there has been no misdirection on either; or, if there had, it has been in favor of the plaintiff, and therefore he, at least, could not complain of that. But I think the judge stated the law clearly, from the cases of *Crawley v. Wells*, and *Mantell v. Paine*; and having so stated the law, he properly directed the jury as to the two points to which he drew their attention. But those two points depended on the *facts*, and those facts were entirely

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for the consideration of the jury: for they were the proper judges, whether the horses were used in husbandry, and whether the green fodder cut for them was proper and necessary. Those questions of fact have now been laid before two several juries, and they have both found verdicts for the defendant. The true principle of all new trials is, that the case has not been properly considered, so that justice may not have been done, and therefore alone it is, that the Court orders a further enquiry. That principle was laid down by Lord *Mansfield*, the case of *Bright, executor, &c. v. Eynon (p)*, where the origin and history of that practice, are entered into, and the reasons detailed.

In this case (in the first instance) the Court thought that there was some doubt as to the facts, and they sent it down to a new trial. The plaintiff got a special jury, (and he himself prayed a tales, so that he could not be dissatisfied on that ground,) when, on full consideration, that jury also found a verdict for the defendant. After such repeated investigation, I think that the case ought not to be sent to a third trial.

It is true, as Sir *William Owen* has said, that there is no limit to the discretionary power of the Court, to order as many new trials as it thinks right; but that is where the jury mistake, or neglect, or abuse their duty, by finding, from preju-

dice, contrary to *law*, on a question of *law*; but it would be a very great stretch of authority, to send a mere question of *fact* to a jury three times successively. You might as well, at once, annex a *mandamus* to the record, ordering them to find in the way proposed, and thus, at once, take away from them their peculiar and constitutional province altogether.

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As to the point, of the plaintiff not having sufficiently described his title in the declaration, I am of opinion, that if there be a palpable nonsuit apparent on the record, the Court should not send it down again in that state, for that would be absurd. I certainly myself think, that this declaration is bad, but I do not mean to decide that point. It is not necessary, certainly, for a plaintiff to set out particularly his *whole* title in the declaration, but he must *state enough* to bring himself within the words of the statute under which he sues. He should have stated himself to be the farmer, and he must have proved it: for it is necessary for him to bring himself within some of the denominations enumerated in the statute. I think, therefore, that there is, at least, great weight in that objection.

Then the smallness of the sum sued for is, in itself, a sufficient ground for refusing to send this cause down to trial a third time; for if we were to do so, there would be no end of litigation.

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GARROW, *Baron*. The Court can never have any wish to invade the province of a jury, and I should be amongst the first to regret it, if any such jealousy were well founded; but it is the duty of Courts, where juries wantonly find verdicts against law and justice, out of mere perverseness, to grant new trials without limit, and to send down the facts again and again, till they find a more sober-minded jury. On the evidence given in this case, the verdict which has been found is not one which I should have given, and so the first jury thought: for they found the plaintiff entitled to *something*, at least, although they ultimately gave their verdict for the defendant. I much disapprove of the manner in which that verdict was given altogether, and I think the just preponderance of the evidence was against it. I do not, however, join in the opinion, that in a case of this sort, where the subject-matter is one that may be the ground of many other actions of the same nature in future, the smallness of the sum sought to be recovered is alone a sufficient reason for refusing a new trial; yet, as the plaintiff must have paid the costs, that makes it matter of serious consideration how far, even on his account, we should be justified in granting it; and, as it has turned out, it would have been mercy to him if we had refused it on the former occasion (*q*). Taking all these circumstances into consideration together, therefore,

(*q*) Vide on that point *Macrow v. Hall*, 1 Bur. 11.

I concur

I concur generally in thinking that this rule ought to be discharged.

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*Per Curiam.*

Rule discharged.

IN THE EXCHEQUER CHAMBER.

Thursday,  
29th January.

*Coram* RICHARDS, L<sup>d</sup>. CH. BARON.

WILMOT, Clerk, v. HELLABY and others.

THE plaintiff, rector of *Trusley (Derby)*, filed this bill against the defendants, occupiers of lands within that parish, for an account of tithes generally.

Where an adverse title to the tithes is set up and established, against a demand by a rector, who offers no evidence to impeach such title, he is not entitled to an issue.

The defendants denied the plaintiff's title to the tithes of the lands in their occupation, which formed part of two estates, called *Grangefield* and *Nunsfield*; and for those liberties (as they were called) two of the defendants set up a claim to the tithes, by reason of the former having, before the dissolution, belonged to *Croorden Abbey*, and the latter to *Kingsmeade Priory*; when (as

The defendant was permitted to go into the evidence of his right to the tithes, where his title appeared likely to be clearly

established, although he had inaccurately stated the subject-matter of his defence in his answer.

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the answer stated) the said farms, together with all tithes and ecclesiastical dues, became vested in the crown.

The answer then set forth a grant of *Henry VIII.* to *Robert Fytche*, of the said farms, and also all the tithes; and alleged, that thereby the said farms and estates, together with all the tithes or ecclesiastical dues arising therefrom, *duly vested and united in possession in the said Robert Fytche*, and all such tithes therefore became due to him, &c. his devisees or alienees; and the defendants having asserted their title, derived from the grantee, insisted that the said lands should *therefore be presumed to be exempt or discharged from the payment of any tithes to the rector.*

In support of that defence several old terriers were put in (professing to state in detail the rights of the rectory); most of which, after having stated the rector to be entitled to tithes in kind, and certain money payments, contained an express exception of *Grangefield* and *Nunsfield*, Letters patent of *Henry VIII.* to *Robert Fytche* of the estate, and also *all and all manner of tithes*, and several old deeds, mesne conveyances, &c.: whereby it appeared that former owners of the farms had dealt separately and *eo nomine* with *the tithes*, as forming part of their estates, as well as the land; and the defendants gave full evidence of non-payment of tithes.

*Martin*

*Martin and Dowdeswell*, for the plaintiff, objected to the duplicity of the pleadings, as putting on the record a defence of exemption from tithes, on the ground of the estate having belonged to the religious house, and a claim of title derived from persons under whom the defendants claimed; and they contended, that on such a record the evidence offered could not be given, and that it was not sufficient for the defendants, in the case which they had attempted to make, merely to shew that the tithes were not in the rector, unless they also proved them to be in themselves, if on such an answer they were entitled to do either; but,

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 and others,

The *Lord Chief Baron* observing, that the answer was certainly very inaccurately drawn, and that it had deduced wrong conclusions, held it sufficient to let in the evidence (*a*), as there might be a title to tithes made at a different time from, and independent of the title to the land, by some new grant. And the defendants had stated, and clearly shewn, the tithes not to be in the rector; and though they had also stated them to be in themselves, it was not necessary, in the present stage of the case, that they should prove that more particularly, although (judging from the evidence already given) it would, most probably, not be a difficult matter for them to do so.

On such a case, therefore, his Lordship said, he could not decree an account.

(a) See *Strutt v. Baker*, 4 Gw. 1430.

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and others.

An issue was then demanded on the part of the plaintiff, as *rector*.

*Dauncey, Cooke, Wingfield, and Phillimore*, for the several defendants, submitted, that in cases like the present, and proved as this had been on the part of the defendants, the rector was not entitled to an issue as a matter of right; and they adverted to the decision of *Barker v. Barker (b)*, and the cases there cited.

*Martin* replied, that in those cases the right to the tithes, on the part of the party claiming adversely to the rector, was clearly and satisfactorily made out.

*RICHARDS, Chief Baron.* This case is also sufficiently clear, and the authorities cited are precisely in point against the plaintiff. I have always considered the general rule to be certainly, that a rector and an heir at law are entitled to an issue; but the cases cited afford instances, where it has been refused to a rector. The bill must therefore be dismissed.

Bill dismissed \*.

(b) Wightw. 398.

\* The cases of *Barker v. Barker*, and of *Scott v. Airey*, and *Strutt v. Baker*, there cited, are not perhaps (strictly speaking) exceptions to the rule of law, which gives a rector a right to demand an issue; because, in those cases, as in the present, the defendants all claimed, and successfully, the tithes: that is, they claimed to be rector *pro tanto*, or, at least,

BOWDEN and another, Assignees, &c.  
v. GLASSON.

1818.

Saturday,  
31st January.


*JONES, D. F.* had obtained a rule *nisi*, for changing the *venue* in this action from *Devon* to *Cornwall*, in consideration of the inconvenience and expense to the defendant if it should be tried at *Exeter*, on an affidavit, that the plaintiff's cause of action arose in the latter, and not in the former county; that certain persons, whom defendant was advised would be material witnesses for him, resided at *Falmouth*, near one hundred miles from *Exeter*; and that defendant intended to admit the trading, and all other matters relating to the bankruptcy of the bankrupt, except the petitioning creditor's debt.

Owen Sir William, now shewed for cause, that (as the affidavit of the plaintiff's solicitor stated) the bankrupt resided at *Exeter*; that the act of bankruptcy was committed there; that the petitioning creditor's debt was contracted there; and that some of the witnesses, to prove the petitioning creditor's debt, resided there, and others in *Devon* (eastward of *Exeter*), and *Somersetshire*, and least, to stand in *loco rectoris*, as to the land from which the tithes were sought to be recovered, so that the plaintiff's right as *rector*, as against the adverse claimant, was negatived; or, as the distinction is well taken by the Court, in *Barker v. Barker*, 'they were all cases of one common law-right opposed to another.' The party succeeding, therefore, must have proved himself to be *rector*.

The Court will discharge a rule obtained by a defendant to change the *venue* in an action against him by the assignees of a bankrupt, on the usual affidavit, that the cause of action arose in another county, and that his witnesses reside there: the plaintiff swearing, that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the *venue* is sought to be removed, and undertaking to give evidence in the original, or the third county; and that although the defendant have agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt.

The costs to abide the event.

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one eighty miles north of *Exeter*. And he submitted, that although (as *Exeter* was a county of itself, and the cause of action arose there) the plaintiff could not undertake to give material evidence in the county where the *venue* was laid, which would at once enable him to discharge this rule, according to the daily course; yet, as it was now the practice, where the plaintiff shews the defendant's affidavit to be false, as that the cause of action arose, in fact, not in the county mentioned in the affidavit, but in a third county, he (plaintiff) shall be at liberty to retain the *venue*, on undertaking, in the alternative, to give material evidence in the county where the *venue* be laid, or in a third county—(*Neale v. Nevill, Savory v. Spooner* (a))—he would here undertake to give material evidence in *Exeter* or *Devon*, and that would entitle him to retain the *venue*. In *Dick v. Narrish* (b) it was held, that where the defendant could not legally and truly swear, according to legal apprehension, that the whole cause of action arose in the county to which it was sought to change the *venue*, because a material part arose in another county: and where there would be so material inconvenience on both sides, the Court would not change the *venue* (c).

He then urged, that, although where the witnesses on both sides reside in the defendant's


(a) 6 Taunt. 565.

(c) 3 Taunt. 464. 6 Ib. 565.

(b) 7 Ib. 178.

county,

county, the Court will change the *venue*; they will not do so, where the inconvenience, in respect to the residence of witnesses on either side is material. *Flecke v. Godfrey* (d), and *Holmes v. Wainwright* (e).

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Costs were applied for, on the ground of the defendant's affidavit having been falsified.

*Jones*, in support of the rule, insisted that it was necessary, that to be entitled to retain the *venue*, the plaintiff should undertake to give material evidence in *Devon*, the county in which it had been laid, and cited *French v. Copinger and another* (f). In *Henshaw and another v. Rutley and another* (g), it was held necessary and indispensable that the plaintiff should undertake to give material evidence in the county where the *venue* is laid, in discharging a rule to change the *venue*, where the cause of action arose partly in one county, and partly in another. As to the plaintiff's inability to give the usual undertaking, Lord *Ellenborough* distinctly says, in the case of *Price v. Woodburne* (h), where the *venue* was laid in the same incorrect way, the action having arisen in a third county, so that the defendant's affidavit was falsified, but still the plaintiff could not give the necessary undertaking: '*The plaintiffs have brought this difficulty upon themselves, by having laid their venue in a wrong*

(d) 1 T. R. 782, *in notis*.


(e) 3 East, 329.

(f) 1 H. Bl. 216.

(g) 1 N. R. 110.

(h) 6 East, 434.

county,

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*county, where no part of the cause of action arose, which prevents them from giving the usual undertaking, always required, to enable a plaintiff to bring back the venue, after it has been changed: and such being the general rule, it is better to abide by it, otherwise we shall have to try every cause on a motion to change the venue,' and that is precisely applicable to the present case: and in agreeing to admit the fact of the bankruptcy, the defendant brings himself within the reason of Lord Ellenborough's decision in *Holmes v. Wainwright* (i). Therefore he contended the plaintiff was not entitled to retain the venue.*

But the Court were of opinion, that the plaintiff had shewn sufficient cause in the distance of the residence of his witnesses from *Launceston*; and therefore they

Discharged the rule.

Costs to abide the event.

(i) 3 East, 330.

## The ATTORNEY GENERAL v. FRANCIS KING.

*JERVIS* had, on a former day, obtained a rule, calling on the Attorney General to shew cause why an order of the 6th *November* last, giving him liberty to amend this information for penalties, on payment of costs, so far as to strike out *ten new counts* added to the original information, for supposed offences laid to have been committed *after* that information was filed, and the addition made in the twenty-fourth count, in claiming double duties for non-payment of single duties, alleged to have been incurred after the day the said original information was filed, should not be restricted accordingly.

On moving for this order it was stated, from the affidavit of the defendant's solicitor, filed in support of the motion, that this prosecution originally arose out of a seizure of soap, by certain officers of excise, on the 3d *March* 1817, and which had been claimed by the defendant in this Court, on a proceeding *in rem*, who gave security for the crown's costs in case of condemnation: and an information was filed in the claim cause, on the 23d *April* 1817, consisting of four counts.

The first, charging the said soap, seized on the said 3d *March* 1817, to have been fraudulently hid and concealed, and thereby become forfeited.

1818.

*Saturday,*  
31st *January.*

The Court refused, on cause shewn to discharge a side-bar rule, allowing the Attorney General to amend an information for penalties incurred under the Excise Laws, on payment of costs, as to ten new counts which had been added, charging other offences laid on days long subsequent to those in the original information, and to the filing of that proceeding, and the issuing of process thereon, and although the name of a succeeding Attorney General had been introduced; and although the defendant was served with process on the first information, in *Easter* Vacation, returnable the first day of *Easter* Term: and the side-bar rule for amending, was not obtained till the first day of the following *Michaelmas* Term, nor the information so amended filed till the *Scal-* day after *Michaelmas* Term.

The

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- The second, that the said soap was found in a private place belonging to the claimant, and by him made use of for the keeping of soap, he being a maker of soap, whereby, &c.

The third, that the claimant did, on said 3d *March* 1817, knowingly receive into, and have in his custody and possession the said soap, after the same had been removed from the place where the same had been made and manufactured, and where the same ought to have been charged with the duty, before the duty had been charged on such soap, whereby it had lawfully become forfeited.

And the fourth charged, that the said soap was fraudulently deposited in a certain place, with an intent to defraud his majesty of the duty, whereby the said soap was alledged to have become forfeited.

The trial of that information *in rem* came on at the Sittings after *Trinity* Term 1817, when, after a long investigation, and witnesses had been examined on both sides, the Attorney General withdrew the record, and had not since proceeded in that cause.

On the 17th *April* 1817, the defendant was served with the process, tested 12th *February*, and returnable on the 23d, *the first day of Easter Term* last, to which an appearance was entered as of the same Term, but no *information*

tion was filed until the Seal-day after Trinity Term following, and after the trial of the said claim-cause. That information was filed in the name of Sir *William Garrow*, Knt. his Majesty's then Attorney General, and intituled as of *Easter Term*, and delivered over on the Seal-day after *Trinity Term*. It consisted of fourteen counts.

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The 1st, charged the hiding and concealing soap on the 3d *March* 1817. The 2d, the same offence, on the 26th *February* 1817, and ten other days, between that day and the said 3d *March*.

The 3d, 4th, 5th, 6th, 8th, 9th, 10th, and 11th, 12th, and 13th, various other offences in respect of making soap, on the said 3d *March*: each alternate count varying the days, as in the 1st and 2d.

The 14th charged the defendant, on said 26th *February* 1817, and from thence continually until the 23d *April*, (the day of exhibiting the information,) with making soap, whereby certain duties, amounting to 1250*l.* became due to his majesty, and that defendant did not, within the time limited by the statute, pay the same; wherefore he had forfeited double the amount of said duty.

On the 1st day of *Michaelmas* Term last, a side-bar rule was made for amending the inform-

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ation, upon payment of costs: and, on the Seal-day after *Michaelmas* Term, an amended information was filed, intituled, on *Friday* next, after fifteen days of *St. Martin*, in *Michaelmas* Term, in the 58th year, &c. and was in the name of Sir *Samuel Shepherd*, his Majesty's then Attorney General, and not of Sir *William Garrow*, as in the first information: and after some unobjectionable alterations in the first thirteen counts, there were added *ten new counts*, alleging similar offences to have been committed by the defendant long subsequently to the days laid in the original information, namely, in *June, July, August, September, and October 1817*: and the 24th count charged offences committed between the 6th *July 1816*, and the day of exhibiting that information, *being the 28th day of November 1817*.

It was urged, that so extensive and substantial an alteration of the record could not, in fact, be made as an amendment, but was altogether a new information, and ought to be so considered by the Court. That a new process ought to have been issued on it, as if it had been in date, as well as subject-matter a new information, and that the defendant was entitled to plead *de novo*; and therefore it was submitted, that as to those ten new counts they ought to be struck out of the information; for that such counts could not, under the circumstances of this case, be now added to the old information.

*Dauncey*

*Dnuncey* and *Walton* now shewed cause, relying mainly on the amendment (extensive as it was) working no injury to the defendant, because a new information or informations might have been filed, so that it would produce no benefit to the defendant, except what he might derive from the delay thrown in the way of the crown, which they urged was a benefit, of which the Court would hardly suffer him to avail himself by such a motion as the present. And they submitted, that the day of laying the offences in the information was not material, (*Attorney General v. Weeks (a)*, ) and therefore the defendant could not, on this application at least, be entitled to the motion prayed.

*Jervis* endeavoured to support his rule, by arguments drawn from the analogy of such proceedings as the present information, with those in ordinary cases of penal actions, where the Court had frequently refused to suffer the declaration to be amended, lest the defendant should be deprived of the benefit of any bar, as the statute of Limitations, &c. : contending, that the introduction of the new counts was an abuse of the side-bar rule; and he adverted to the lapse of three terms, which had been suffered to pass before the amended information had been filed as strengthening the objection.

(a) 1 Bunb. 224.

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*Per Curiam.* [Wood, *Baron*, *dubitante*, inclining to the opinion, that there was an irregularity in so connecting the subsequent information with the previous process.]

There is no objection to the process at present before the Court, and we will not strike out the additional counts which have been regularly added. Therefore the present order to shew cause must be discharged.

Rule discharged.

## IN THE EXCHEQUER CHAMBER.

1818.

Coram RICHARDS, L<sup>D</sup>. CH. BARON.

3d February.

DRAKE, Clerk, v. SMYTH and others.

THIS bill was filed by the vicar of *Warmfield* (York), for an account of tithes.

Proof of payment (as a modus) of 8d. per acre for hay, by parol

testimony and receipts; [although opposed by an extract from the ecclesiastical survey, valuing the tithe hay of the vicarage at 3s.—a terrier recording that *all tithes* (except a moiety of the corn tithe) belonged to the vicar,—several others stating the vicar to be entitled to the tithe of hay, or a *modus* of 8d. per acre,\*—and an entry in the parish register of a memorandum, that the vicar had, in a certain year, taken the tithe in kind of some of the occupiers, and agreed with the rest for compositions exceeding that sum], held so strong, as that the payment was sent to an issue.

The same evidence, in support of a sum of 5s. in lieu of tithe of hay payable by all and every the occupiers of lands and tenements within a certain township, outweighed by terriers, stating that sum to be payable 'for all the hay in *their crofts*, and nothing paid for all other except herbage.'

Payments, professing to cover articles stated in terriers *nominatim* to be titheable, held not to be *moduses*.

Terriers of the highest order of evidence in tithe causes, and (*semble*) paramount to usage: and where they record tithes to be payable for certain articles *speciatim*, are presumptive proof of such tithe being payable in kind. Where also they state any fact concerning the *mode* of rendering the tithe, such statement is evidence of that fact, and is allowed to qualify the render, and to define, in great measure, its legal character.

The more ancient documents, as the Ecclesiastical Survey, &c. &c. are only *primâ facie* evidence requiring to be supported by proof of usage, or other confirmation, and may be rebutted.

A payment of 3d. a head for tithe of lambs not rank, and is issuable where supported by proof; but terriers, stating the vicar to be entitled to 'tithe of lambs,' are sufficient to destroy the presumption, that such payment is a *modus*.

A memorandum, entered by a former vicar in an old book, called a parochial register, and kept in an iron chest at the vicarage, is admissible evidence on behalf of the vicar. Such custody is proper for such a book, which is common property.

See, in page 376, a distinction made as to the common course of practice established at the bar, in addressing the Bench, between Courts of Law and Courts of Equity.

\* These terriers were considered as inclining rather in favor of the payment being a *modus*, and as repugnant to and subversive of the former terriers.

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and others.

The plaintiff claimed all the tithes, great and small, a moiety of the tithes of corn and grain only excepted.

The bill having been amended, prayed the usual account; and also that the Earl of *Westmoreland*, now made a defendant, might state whether he claimed any, and what right to any, and what part of the tithes claimed by the plaintiff.

The defendants (the occupiers) set up the following moduses:—

Eight-pence an acre for hay within the townships of *Warmfield*, *Heath* and *Kirkthorpe*—1*d.* for every sheep shorn within the parish, in lieu of the tithe of wool—3*d.* a head in lieu of the tithe of lambs—2*d.* for every milch cow, in lieu of her milk and calves—10½*d.* for the occupiers of every ancient messuage, and of every messuage built upon the scite of an ancient messuage, and called house dues, in lieu of the tithes of the titheable matter, grown in the gardens and orchards belonging to such messuage, and of eggs and poultry, and young pigeons produced in the yards, gardens, and orchards of such houses. And one of the defendants set up a modus of 5*s.* a year, in lieu of all tithe hay in *Sharlston*, (another of the townships,) payable by all and every the occupiers of lands and tenements within, &c.

The Earl of *Westmoreland*, one of the defendants,

fendants, claimed a right to the tithe of the corn and grain, and peas, beans, and pulse, within the township of *Sharlston*, a sub-division of the parish of *Warmfield*: against which no evidence was offered by the plaintiff.

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*Martin* and *Simkinson*, for the plaintiff, put in and read an entry of the endowment of the vicarage of *Warmfield*, from *Walter Grey's Roll of Endowments*, produced and read by the officer from the Registry of the Archbishop of *York*, and several terriers of different years, between *June 1716*, and *June 1809\**:—when his Lordship called on the counsel for the defendants to proceed.

20th January.  


*Dauncey* and *Barber*, for the defence, relied on the moduses; and they fully proved the payments, by parol testimony and old receipts.

In

\* The terriers, beginning with that of 1716, ran thus:—  
 ‘The tithe of hay, or a modus of 8*d.* per acre for all hay within, &c. (the two first townships,) but in *Sharlston* 5*s.* per year for all the hay in *their crofts*, and nothing paid for all other except herbage—also all wool, and lambs, pigs, geese, ducks, apples, pears, plums, and throughout the whole parish.’ And some of the terriers had the following additional memorandum:—‘What these moduses are founded upon is not known at present. It appears by a memorandum entered into the Register’s Book by Mr. *John Leake*, formerly vicar, that he took hay in kind from some of the inhabitants of the township of *Warmfield*, in the year 1687, and had agreed with others for 12*d.*, 14*d.*, and 16*d.* per acre; but this agreement was over-ruled in the Court of Exchequer, and reduced to 8*d.* per acre.’

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In answer to that case it was contended, that the evidence of the money payments was rebutted, as far as it had been offered to shew that such payments were moduses, by the plaintiff's documentary evidence; and they read an extract from the Ecclesiastical Survey, wherein it was stated, that 'the vicarage is valued, in a mansion, 3*s.* 4*d.*—tithe grain, one year with another, 3*l.*—tithe lamb and wool 16*s.*—tithe hay 3*s.*—oblations commonly 13*s.* 4*d.*—minute and privy tithes 20*s.*—in the whole, one year with another, 5*l.* 12*s.* 8*d.*;' which, they argued, was not consistent with so large a payment as was now set up as a modus. They then read the terriers\*; which kind

\* The first of these was in the shape of an entry, made in a book which was called a register of the parish of *Warmfield*, commencing in 1652, and was dated 26th *September*, 1693; and it stated, that 'one moiety of the tithe of corn, and all other tithes, great and small, except the other moiety of corn tithes belonging to the vicar.'

The terms of the other terriers have been already stated.

Another entry from the same book was read, dated in 1668, which was a memorandum signed by the then vicar (*Leake*), that the vicar had, in that year, gathered hay in kind of three persons, and had agreed with the rest at 12*d.*, 14*d.*, and 16*d.* *per* acre;—but to that memorandum was added, in a different hand, 'This was over-ruled by a commission in the Exchequer, and brought to 8*d.* an acre.' The book was produced from an iron chest in the vicarage-house.

[On that book being produced, it was objected to, on the part of the defendants, as not being evidence against them, for that entries in such a book by a vicar, and coming out of his own possession, could not bind his parishioners.

On

kind of testimony (they submitted) had been held to countervail parol evidence of usage, in the recent case of *Mytton v. Harris* (a); and they urged, that it was evident from their express terms, that neither payment for hay could be a modus; that the latter payment of 5s. for *Sharlston*, if it were a modus, was specifically confined to the hay grown in crofts, which are small closes of land adjoining the house; and that even so partial a defence was defective, because it had not been stated, or proved, that any part of the defendant's lands were crofts. They also objected to the latter hay modus, (5s. for *Sharlston* :) that it was ill laid, and could not be supported; for that a payment to be made by all the occupiers of lands and tenements, whether they have hay or not, would be unreasonable, even if such a custom were capable of proof.

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They then took the objection of rankness to the payment of 3d. a head for lambs\*.

*Dauncey,*

On the other hand, it was said, that the public parochial nature of this book, and its antiquity and custody, made it evidence; and

The Lord Chief Baron being of that opinion,

Over-ruled the objection, and  
 received the evidence.]

\* The arguments used, and the authorities cited on that point, were the same as those which may be found in *Bertie v. Beaumont*, ante, vol. ii. page 303.

(a) Ante, vol. iii. p. 19.

1618.

DRAKE  
v  
SMYTH  
and others.  
26th January.

*Dauncey*, citing the case of *Bertie v. Beaumont* (b), against the objection of rankness, and the cases of *Hardcastle v. Smithson and Slater* (c), *Shelton v. Montague* (d), *Cowper v. Andrews* (e), *Scarr v. Trinity College* (f), and *Chaytor v. Trinity College* (g), in answer to the charge of the *modus* having been ill laid, rested the merits of the defendant's case, upon the evidence of usage already before the Court. They distinguished the present case from that of *Mytton v. Harris*, because there the terriers had recorded distinctly, that the tithe was payable in kind, whereas here it was left in doubt what mode of rendering the tithe was used.

*Martin* and *Simkinson* again opposed to that testimony the evidence of the Ecclesiastical Survey, the terriers, and the *memoranda* in the parish register, dwelling particularly on the earlier terriers, and the last of 1809\*; the effect of all of which was (they submitted) to shew, that the tithe  
of

(b) *Ante*, vol. ii. p. 303.

(c) 3 *Atk.* 245.

(d) *Hob.* 118.

(e) *Ib.* 39.

(f) 3 *Anstr.* 760, and 4  
*Gw.* 1454.

(g) 3 *Anstr.* 841, and 4  
*Gw.* 1459.

\* That terrier, (which was signed by the church-wardens, and many of the parishioners, amongst whom were *five of the present defendants*, but it was not signed by the vicar), is particularly noticed in the judgment, on account of the effect of the following sentence, which formed part of it:—'In lieu of tithe wool and LAMB, there has been paid to the late vicar 1*d.* for each fleece of wool, 3*d.* for each lamb, and 2*d.* for each milch cow.'

of hay was payable to the vicar, and that it was payable in kind; one of them stating, that a former vicar had actually received the tithe of hay in kind, and had raised the amount of the composition for that tithe. No modus was mentioned in either of them, and that omission had been made matter of observation by the Lord Chief Baron (*Thomson*) in *Mytton v. Harris*, and formed a part of the ground of his judgment: the last terrier (*n. p.* 374.) too, stated a fact, which proved almost expressly, that the payments for wool, lambs, and milch cows, were modern temporary compositions. They then observed on the memorandum at the foot of several of the terriers, (*n. p.* 371.) expressing doubt of the existence of the compositions recorded there, under the denomination of moduses; and stated that search had been made for the commission there spoken of, among the records of this Court, and that no trace of it could be found.

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 v.  
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*Dauncey* having replied, in right of his having been called on by the Court, in the early part of the hearing, to proceed with the *defendant's* case,

27th January.  


*Martin* rose to address the Court, in conclusion, as counsel for *the plaintiff*; when

*Dauncey* objected to that course as irregular, inasmuch as it would be, in effect, a second reply.

The *Lord Chief Baron*, however, allowed *Martin* to take the course he was about to pursue for the

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the present, intimating, at the same time, that the objection was, perhaps, well founded, and that he would ascertain the course at present obtaining in the Court of Chancery, as to the practice at the bar under similar circumstances\*.

2d February.

RICHARDS, *Chief Baron*, [having at once directed that the bill should be dismissed with costs, as against Lord *Westmoreland*,] proceeded to state the plaintiff's claim, and the several defences of the respective defendants, as far as regarded the money payments for hay, wool, lamb, milch cows, and house dues, which his Lordship pronounced to have been so fully established, by the evidence of long-continued payments, as far back as living memory reached, unimpeached by evidence of the tithes having been taken in kind, as to require the plaintiff to oppose a strong case to the merits proved.

It

\* His Lordship has frequently, when discussions of this sort have arisen at the bar, insisted on an obvious distinction in regard to a departure from the usual practice, as properly permitted, in a court of equity; although it is not allowed in courts of law, from the nature and constitution of the former tribunal, where a single judge presides, of practical experience and legal knowledge, and who is not likely, as a jury is, to receive erroneous impressions from statements of counsel on matters of fact, or to abuse the latitude assumed by him. Yet he may frequently require information, which a strict observance of the rule would preclude him from, and which, in a court of *equity*, is oftentimes absolutely necessary to the ministering justice to the suitors, in consequence of the complexity of detail, unavoidable in the business of such courts, the great purpose of which is to accommodate differences between parties, by relaxing, rather than insisting on the strict rules adopted, and usefully adhered to in courts of law.

It has been contended, (continued his Lordship,) that the evidence furnished by the ecclesiastical survey, aided by the terriers, rebuts the conclusion that the payment of 8*d.* for the tithe of hay is a modus. If implicit reliance could be placed on that document, it certainly would do so; but I have had sufficient experience to enable me to say, that that is a document which cannot be considered conclusive on such questions. We have then a parochial register produced from the parish chest (and I am still of opinion that that custody makes it evidence, for it is, as one may say, common property), which contains an entry of 1693, purporting to be (though it cannot be called so in strictness) a terrier. That entry notices that one moiety of the tithe of corn, and all other tithes great and small (except the other moiety of the corn tithes), belong to the vicar. That piece of evidence, however, is, by being somewhat at variance with the documents afterwards produced, deprived of much of the importance with which it has been regarded by the counsel for the plaintiff. It appears to have been intended more to mark the division of the tithe, than the mode of paying it, and the favourable presumption which the vicar would deduce from it is altogether negatived by the other documents, and even by subsequent entries in the very same book; for immediately following the entry read, is a note, that that was over-ruled by a commission in the Exchequer, and brought to 8*d. per acre*. Now that note, connected with the fact of payment for so long a period of the precise sum, makes

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makes a very important feature in this case. It makes it evident that that sum was a modus. It is so termed in the book, as opposed to the former agreements compounding for the tithe. It is there called a modus for tithe hay, and the vicar has himself signed the book. The terrier of 1716 calls it so, and all the other terriers, which are regularly signed by the vicar, are in the same terms. And as these documents are confirmed by the fact of payment, there must be an issue directed as to that modus.

The payment of 5s. set up as payable for hay in the township of *Sharlston* rests on different grounds. The defendants, as to that, would have made out a good *prima facie* case by evidence of the payment; but here again the terriers apply, though there is no reference to any such payment in the register book alluded to. Now that payment is stated to have been made for all the hay within the township, whereas many of the terriers, though they recognize the payment, expressly confine it to the hay grown in crofts. All the terriers are quite correct in point of form, and though those just adverted to seem to import a *non decimando* for all the rest of the township, yet I think the evidence of the payment in a greater degree consistent with the terriers, which confine it to the hay grown in crofts, than with its being a payment for the whole of the township, as the defendant's evidence would make it. The terriers stating that 8d. an acre is payable for hay in *Warmfield*, *Heath*, and *Kirkthorpe*, say that it is  
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for all the hay in the township. Those terriers are instruments entitled to great respect, and they form a connected chain of evidence from 1716 to 1809. From the best view, therefore, that I have been able to take of this case, I cannot but consider myself bound by the authority of the terriers, sanctioned as they appear to have been year after year, for so great a length of time, without the slightest impeachment. I shall therefore decree an account of the tithe of hay in *Sharlston*, which I do not think covered by any modus.

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The other moduses set up are parochial, and are all payable at *Lammas*, except the payment of 10½*d.* for house dues, which is payable at *Easter*. The parol evidence supports those moduses, but the receipts are of very modern date, at least with reference to our view of *ancient* payments. We must here also resort to the testimony of the terriers. The first furnish negative evidence against the modus. I do not, however, mean to say, that the modus not being mentioned in them would alone be sufficient to countervail the parol testimony; but it is the mention made of the articles in specie, as wool, lamb, pigs, &c. as paying tithes to the vicar, to which I allude: and though it was put in argument, that the enumeration of such things do not prove that they are titheable in kind, yet as it is the office and purpose of a terrier to specify in what the property of the church consists, it must be taken to do so; and certainly no one ever saw a terrier which did not expressly state that there

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was a modus, where there was any, or some fact which might serve to ascertain the nature of the mode of rendering the tithe: and therefore it is that a terrier, recording in general terms what tithes are payable, must be construed as speaking of such tithes as being payable in kind\*.

The other terriers of the intermediate years are all nearly in the same words, and they are all signed by the vicar, churchwardens, and principal inhabitants, except the last, which the vicar being absent did not sign. That circumstance, however, gives it much more weight as evidence in favour of the vicar, because it was voluntary on the part of the parishioners, as they framed it in the absence of the vicar. And yet I am called on by the defendants to decide, that the parol testimony adduced by them ought to weigh down this mass of documentary evidence in favour of the plaintiff's claim.

In the terrier of 1809 there is an entry that, in lieu of tithe wool and lamb, there has been payable to the *late* vicar 1*d.* for each fleece of wool, 3*d.* for each lamb, and 2*d.* for each milch cow. Now these terriers are ecclesiastical records, and made to be preserved *in rei perpetuam memoriam*. That entry accounts for the receipts for the money payments, and shews them to have been given in consequence of some recent arrangement with the preceding vicar. These pay-

\* Vide *Halse v. Eyston*, ante, vol. iv. p. 49.

ments cannot therefore be moduses, but are rather, under such circumstances, evidence of the vicar's right to tithes in kind, and connected with the other terriers, which are equally strong in favour of the same suggestion, they form together an express recognition and declaration by the parishioners themselves, of the vicar's right to the tithes in kind of all the articles enumerated therein.

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The payment of 10½*d.* is laid as covering several of the titheable matters mentioned in the terriers; and if I am right in thinking that the terriers outweigh the other evidence, that payment cannot be contended to be a modus, because the terriers prove that the articles they profess to cover are titheable in kind, and there is besides no allusion to that payment in the answer, which is drawn with great care, as to its being a modus for any particular tithes. There is no allegation (notwithstanding the evidence given) which puts it in issue as a modus: nor is there any proof that any of the defendants occupied ancient messuages, and that alone would preclude me from deciding in favour of that payment in this case; but I am clearly of opinion, that it is bad on the other ground. I say thus much with a view to any future consideration of these payments. On this part of the case, therefore, I cannot do otherwise than over-rule that modus. There must consequently be an account decreed of those titheable articles.

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On the modus of 3*d.* for a lamb, I have certainly entertained considerable doubt; but I have no difficulty in declaring it to be my firm opinion, that it is as much the duty of a court of equity to decide on questions of fact, as it is that of a jury. If, therefore, I saw a modus set up of 1*s.* for a lamb, no man living can doubt that I should be bound by my oath to decide that it was rank; and if that be not denied, the whole of my proposition is admitted; for I know of no distinction between fact and fact; and in most of the cases brought before a court of equity, a judge is bound to consider and decide on the facts alone.

With respect to the present payment, although in my private opinion I think it impossible to support a payment of 3*d.* for a lamb as a modus, yet if the fact of the payment were clearly made out, I should not think myself warranted in refusing an issue, and for this reason: (although I am aware that it is an incredibly high price,) yet it is difficult to know what was a fair price in a contract made before the commencement of legal memory. So it is with respect to farm moduses. It is difficult to ascertain what might have been considered the fair value before the time of *Richard I.* and therefore it is, that that is a fact proper for the consideration of a jury, who have knowledge of land cultivation. A lamb might have been worth more in the north than in any other part of the kingdom, and one can hardly conceive what in a luxurious country might be  
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the estimation of the thing. Even now the value of a lamb is very different in various parts of the country, and there can be no comparison drawn. It may therefore be best in doubtful cases, perhaps, at once to send it to a jury, who may, from reference to the state of agriculture, or the luxury of the time, and from the examination of witnesses *viva voce*, which may be more satisfactory than on paper, have better means of acquiring a knowledge of the fact than I have at this moment. I should therefore, as I have observed, in obedience to other decisions, have sent this payment to a jury; (although a time may yet come when there may be a more general and correct understanding on the doctrine of rank payments than obtains at present) but that the existence of the terriers shews these payments not to be moduses: and I consider such instruments to be of as solemn a nature as any documents which can be produced on these occasions. Therefore I feel myself enabled to decree an account of all the titheable matters prayed by the bill, except hay, in the townships of *Warmfield, Heath, and Kirkthorpe*; but as to the modus for that tithe there must be an issue.

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Decree:—

Bill to be dismissed against the Earl  
 of *Westmoreland*, with costs.

An account to be taken of the tithe  
 of hay in *Sharlston*, and of wool,  
 lambs, milk, and calves, and all  
 c c 2 other

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other titheable matters of the other defendants, as prayed by the bill.

With respect to the tithe of hay in the townships of *Warmfield*, *Kirkthorpe*, and *Heath*, an issue whether the 8*d.* is payable as a *modus*, in lieu of tithe hay. Costs reserved.

Tuesday,  
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TRIPP v. BELLAMY.

Practice.

If the Court open a rule, made absolute on the usual affidavit of service, to give an opportunity of shewing cause, they will not hear affidavits sworn after the day on which the rule had been made absolute.

*CASBERD* having made this rule absolute, on an affidavit of service, on the 17th *November*, it was afterwards opened again, by the indulgence of the Court, to afford the party an opportunity of shewing cause.

*Moore* was now about to read his affidavits for that purpose, when *Casberd* objected, that as they appeared to have been sworn on the 22d *November*, they ought not to be permitted to be read, because they were made subsequently to the making the rule absolute.

In answer to that objection it was suggested, that the reason that cause had not been shewn in  
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course was, that these affidavits had not been furnished in time, and that therefore the party ought to be allowed to read his affidavit, notwithstanding the day of the caption was subsequent to that on which the rule was made absolute, particularly as there was nothing in the affidavits themselves which would shew that any advantage had been derived from that circumstance, and that otherwise the party would be unable to avail himself of the indulgence which had been granted to him; but—*Casberd* persisting in the objection—

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The Court said, that it was not to be got over. The re-opening the rule was matter of courtesy and favor, and probably would not have been granted if the Court had been aware of the objection now made, which *might* give an undue advantage: therefore (the party not being able to shew cause on the affidavits on which the rule *nisi* had been granted), again made that

Rule absolute.

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## The ATTORNEY GENERAL v. LAMBIRTH.

The Court will not order a bill of particulars of the charges meant to be relied on in an information for arrears of duties, to be furnished to the defendant by the Attorney General, or other officer of the crown, or any measure of a similar nature, although the charges cover a space of thirty years, and the defendant have conducted his business at two separate brew-houses, at a distance of twenty miles from each other; at least unless the defendant furnish the most satisfactory ground for such an application.

The Court will not suffer an application of this nature to stay the trial; and, in the present case, they permitted the Attorney General, notwithstanding a rule was granted to shew cause, to give notice of trial in the mean time.

*JERVIS*, on a former day, obtained a rule, calling on the Attorney General to shew cause, why he should not deliver to the defendant's solicitor, or clerk in Court, *a particular in writing of the duties* (of excise on beer) demanded from the defendant, and sought to be recovered by this information.

The information was not filed for penalties, but was in the nature of an account, for arrears of duties. The first count charged, that the defendant was indebted to his majesty in the sum of 10,000*l.* in respect of the duties on beer brewed by him between the years 1787 and 1802. The second count, in the sum of 10,000*l.* on ale brewed by him between the same periods. The third count, in the sum of 10,000*l.* for beer brewed by him between the 1st day of *May* 1802, and the 6th day of *July* 1803. The fourth count, in the sum of 1000*l.* for ale brewed by him between the last-mentioned periods. The fifth count, in the sum of 10,000*l.* for beer brewed by him between the 5th day of *July* 1803, and the day of exhibiting the said information, being the 6th day of *November* last. And the sixth and last count, in the sum of 10,000*l.* for ale brewed by him be-

*Quere* whether, on a strong case, satisfactorily made out, the Court would not interfere on a qualified application, to assist a defendant to a certain extent.

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tween the last-mentioned periods, extending together over a lapse of time of thirty years. The rule was granted on the affidavit of the defendant's solicitor, stating the counts of the information as above, and that on account of the generality of the charges, and the great space of time covered by the demand, application had been made to the solicitor of excise for the required particular, which had not been furnished. And the affidavit further stated, that the defendant had, in fact, carried on the business of a common brewer for several years past, at *two separate breweries*, at a distance of twenty miles from each other, at neither of which in particular the information charged the duties demanded to have accrued.

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Under these circumstances, the motion was originally made on the ground of its having a reasonable object—that of enabling the defendant to prepare himself to meet a charge of which he could thus only, with any degree of certainty know the extent and foundation: and as without the order prayed being made, the length of time embraced by the information, the total absence of any positive charge, and the general and vague mode in which the counts were framed, rendered it impossible that a defendant could come prepared against every, or any part of it, as to the time, place, or circumstance, on which the excise might chance to fix, as that on which they should think proper to give evidence on the trial: the effect of

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all which must necessarily tend greatly to distress and embarrass a defendant in the situation of the applicant.

As the only authorities, affording any analogy with a case like the present, the following determinations were cited from *Bunbury*. In that of *The Attorney General v. Weeks (a)*, in 1796, where the information was also debt for duties on goods imported, the crown gave evidence of an importation in April 1719. One of the objections taken was, that evidence of an importation *before* the day laid in the information ought not to be received; which the then Lord Chief Baron answered by saying, that any difficulty arising on that ground might have been easily obviated by an application to the Court, who would have made an order for confining the evidence to a certain time; and that, it was submitted, was in fact the whole substance of the present application. In the case of *The Attorney General v. Hatton (b)*, which was also one of similar circumstances, it is noticed in the report, that the plaintiff had given the defendant a note of the *times* of the importations,

[The *Lord Chief Baron* observed, that the latter case did not apply in favor of this motion, because the particulars given there must have been furnished voluntarily by the Attorney General,

(a) Bunb, 223.

(b) Bunb. 262.

and

and not ordered by the Court, and that it appeared that a note of the places was refused.]

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To shew how much the Courts had favored motions of this sort, even in extraordinary cases, he cited the cases of *Doe*, on the demise of *Birch v. Phillips* (c), where an ejectment on a lease forfeited, the Court ordered the plaintiff to furnish particulars of the breaches of covenant on which he meant to rely, and that on the sole ground of its being, in its full extent, highly reasonable; and *Collett v. Thompson* (d), which was an action for non-performance of a contract for the sale of a house, and there the Court ordered the plaintiff to furnish a particular of the objections intended to be taken to the abstract, arising on matters of fact.

The Court [Wood, *Baron*, excepted, his Lordship expressing himself in favor of the application] having intimated that they considered the application not only novel, and without precedent, but in derogation of the prerogative of the crown, and therefore one of considerable difficulty, granted the rule: giving the Attorney General liberty to give notice of trial in the mean time.

The *Attorney General* and *Dauncey* now shewed cause. They submitted, that there having been no instance heretofore of any such order being

(c) 6 T. R. 597.


(d) 3 Bos. & Pul. 246.

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made by the Court, a very strong case should be made out, to create a new precedent in so important a matter, where the object was to tie down the crown in the exercise of its functions for the public service; but the main ground on which they principally took their stand was, that the nature of such cases rendered the delivery of a particular almost impossible, consistently with the course and object of revenue proceedings, at least further than was afforded by the information itself; for it had never yet been the practice, and as the object of such proceedings was the detection of frauds long practised, and only recently discovered, and bringing the defaulters to an account, by means of an investigation on the part of the officers of the crown, it would be in most, or in many cases defeated, by such orders as the one now required. Such proceedings most commonly owed their chance of complete success, or at least the extent of their success, to evidence which might not be got at till the hour of trial, and that often from the mouth of the defendant's own witnesses. Cases of this nature they distinguished from the common-place transactions brought into courts of justice between subject and subject, whose mutuality of dealing often made the practice of delivering particulars easy, and where it was so, it was often useful, and even necessary. A plaintiff, in a private action, must be well aware of the items, and all the particulars of his demand, and capable of giving precise information of every part of the subject-matter of his case. In these revenue cases, on the contrary, the

the officers of the crown can know nothing of particulars, either as to time, place, circumstance, or amount of the various *frauds* committed against the revenue laws, all of which the defendant, if guilty, must himself well know, and be well prepared against, with any such defence as he may be advised to make. If he were not guilty, he could require no other case than his innocence: but if he were, his own consciousness would best furnish him with the charges intended to be substantiated, and with devices for his defence, most likely to be successful. Yet while the crown officers might have no sort of *particular* evidence of the facts on which they proceed, they may have a conviction of the *general* guilt of the defendant, and even of the extent of his frauds, without being able to tell where they began, or where they end, or when or how they were put in practice; all of which they may, however, extract from the opportunities furnished at the trial of the cause. The information itself might be founded, perhaps, entirely on a *prima facie* case, and which might be weakened or betrayed by furnishing what the defendant calls the particulars which he now asks the Court to require on his behalf—the particulars of his own fraudulent proceedings, of which, most probably, the excise know but little more than the general fact.

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The revenue ought not to suffer, or fraud go undetected, because those whose duty it is to endeavour to protect the public, and bring the defaulter

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defaulter forward, are unable to state the particulars, as to time, place, amount, and circumstance, of the fraudulent acts, where the fact is ascertained, and its effect felt—nor should it be tolerated that an Attorney General should be bound by his particulars to a precise day when the fact (which shall be clearly proved) may happen to have taken place on another.

They next submitted, that no advantage could possibly be derived by the defendant from any result of the present motion, but that, on the contrary, granting his application would increase his difficulties, his trouble, and his expence—for other informations would be filed *de die in diem* on every new disclosure of each newly-developed part of fraud, and for every substraction of duties not enumerated in the bill of particulars.

They then submitted, that inasmuch as on the acknowledged principle of law, the crown cannot be bound by the acts, or even by the mistakes of its officers, that principle would render futile, in effect, the proceeding now sought to be established in practice, if the Court should think that they have power to do what is required of them.

They distinguished this species of information, (which was merely for an account of arrears of duties) from cases of proceedings for statutory penalties, for the sake of the argument *à fortiori* in a civil case: protesting, at the same time,

time, against the existence of any right on the part of a defendant, even in a penal information, to obtain what was now sought; and they submitted, that like the attempts made in *The Attorney General v. Green* (e), and *The Attorney General v. Harding* (f), this new experiment should also fail on similar grounds, which (whatever suppositious advantage it might appear to afford, if successful to the many defendants against whom it was the duty of the crown to proceed), would infinitely embarrass such proceedings, or would have the effect of defeating them altogether, and that without being at all for the good of the subject, who must be still harassed, day after day, by renewed proceedings, although, perhaps, they might turn out to be useless to the public, from the effect of the technical restrictions imposed by the Court on the officers of the crown.


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On the cases which had been cited, they observed, that the first, which was the only one that even appeared to be in point, was distinguishable; for that case was a strong one certainly for the interference of the Court, and they might there perhaps have thought it right to make the order; but still it was at most a mere observation made in the way of recommendation of the experiment by the Lord Chief Baron at the moment, and if such an application had been made, it must have been discussed, and the result might have been,

(e) Ante, vol. iv. p. 224:      (f) Ante, vol. iv. p. 381.

that

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that even there it would not have been granted. The act of importation, in that case, took place four years before the day laid in the information, and there was only one importation charged. Had there been a general charge, it would then indeed have more resembled the present case. The other case from *Bunbury*, they submitted, was, as far as it went, against the present application, for the Lord Chief Baron over-ruled the objection (which was, that where one importation only was laid in the information, the plaintiff ought not to be allowed to prove several at several times), saying, that it was no more than the common case of an *indebitatus assumpsit pro diversis bonis venditis et deliberatis*, &c. where the plaintiff might give evidence of *any goods at any time* sold.

*Jervis* and *Lawes*, in support of the rule, contended, that unless there was a distinction made in favour of the crown, giving an advantage which a subject had not, there could be no reason in principle why this rule should not be made absolute; for with reference to the subject-matter, it is nothing more than a common civil proceeding in debt, and if the allegations in the information do not set forth with sufficient certainty and minuteness the objects of the proceeding, the principle of the now common practice applies, and a bill of particulars ought to be furnished, as is now universally done in all such cases, and is the received and common practice of all the Courts. The cases which had been cited (they observed) had not been brought forward as being  
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Exactly in point, for in those days the practice of calling for bills of particulars had not yet obtained, but they were cited because they furnished the principle of the present application, and shewed that the Court might do that which was now asked of them; and although it had been contended that the Court had no right so to interfere, the first of those cases was admitted to have been one on which the Court might have made a similar order. The crown has been held not to be bound by acts of parliament, where not expressly named; but it never was asserted that the crown is not bound by the principles of justice. If it is contended, that because there is no precedent of any such application having been granted, it may be answered, that the practice is but of modern date, and there was a time when there was no precedent for the present every-day practice of the Courts in that respect, in cases between subject and subject. It is also probable that informations of this comprehensive description have not been usual.

[*GRAHAM, Baron.*—I have known an instance of an information where the crown recovered 30,000*l.* for arrears of duties accruing during a space of twenty-three years.]

It was a saying of Lord *Hardwicke's*, where he saw that justice might be effected by the adoption of any unusual proceeding, that if there were no precedent for it he would make one, which there can be no doubt the Courts are at all times


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times entitled to do in a mere question of practice as this is.

In this case particularly (and there cannot be a stronger for such an application), the defendant has, during many years, been paying the excise duties as a common brewer for two distinct breweries. Those duties are collected eight times a year, yet in a business of such a complicated nature, the transactions of a defendant's whole life may be entered into, on a question of this sort, when his witnesses may have been long dead, or are not to be found, although in cases of penalties the legislature has fixed a period within which the crown must proceed, or be barred. But the main ground of the application (they urged) was the extreme difficulty which a defendant, without the benefit of such an order as was now prayed, must labour under in preparing for so indeterminate and vague a charge, and the expence and inconvenience he must necessarily be put to in bringing as witnesses all the various persons who have been for so long a time in his employ, and the almost impossibility of instructing his legal advisers, while he himself remains totally ignorant of the offences intended to be charged against him. As to what had been said of a new information being filed on every new discovery, that perhaps may be, but it is no answer to this application, that to grant it would be more inconvenient or more expensive to the defendant. What he seeks is something like certainty with respect to the charge to be brought against

against him, that he may know, or at least be able to guess, what it is that he is called on to defend himself against, and that would be more advantageous to him, even if he were sued every day, than to be hampered with the intricacy of one such single information as this. And therefore they prayed that the Court would make absolute the rule which they had granted.

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The *Attorney General*, in reply, observed, that the practice and usage itself of the courts of law had been properly said to be indicative of the laws and rules by which that practice was regulated and modified, and where in important matters there could be no precedent found, it was to be presumed that there was no such practice, and that the law did not authorize it. As to what had been said of cases between subject and subject, as distinguished from those wherein the crown was a party, he repelled what he regarded as an attempt to invest the present question with popular erroneous prejudices, by repeating the position often insisted on on similar occasions, that the term 'The crown,' in these questions, means nothing more in truth than the interest of the community of the subjects of the realm, who would be one and all injured by the effect of these frauds on the public revenue, as opposed to the illicit advantage to be derived to the individuals who adopt such practices for their particular gain.

Having recapitulated his former arguments, to  
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shew that the principle in common private cases could not subsist in public proceedings, he then adverted to the practice on a bill filed against the Attorney General, who, as a public officer, could not be called on to answer otherwise than in the usual general way, an usage resulting from the privilege of his official situation, which was an exception from the course of practice of the Court in all ordinary cases, and argued from thence that there were existing privileges in the case of the Attorney General, suing on behalf of the crown, and that they were recognized by the Court.

[*GRAHAM, Baron.* We have held in this Court that that general answer cannot be excepted to\*.

*RICHARDS, Chief Baron.* The Attorney General is in that respect within the rule with respect to infants, who may state any thing they mean to prove, but cannot be themselves called on to answer further; for he is only to protect the interests of the crown.]

He then observed, that there were many other instances where the Courts had refused to interfere

\* *Davison v. The Attorney General*, (30th June 1813,) in which the then Lord Chief Baron, *Macdonald*, delivered the unanimous judgment of the Court, deciding—after very considerable argument on exceptions to the formal answer, put in by the Attorney General to a cross-bill filed by *Davison*, for a discovery of matters alleged to be material to his defence, in the information then pending against him, that it was in the discretion of the Attorney General whether he would.

fere in cases where the crown was party, as they would do in common cases. The Court of Common Pleas had refused to change the custody of a prisoner confined at the suit of the crown, who had been brought up before the Court for that purpose by *habeas corpus*, and they said that they had no power to do so without the consent of the crown.

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All these objections therefore being considered, he relied that the Court would not sanction the attempt to introduce a new precedent, not founded in practice, and which would be attended with so much manifest inconvenience, to the obstruction, and perhaps defeat of proceedings for enforcing the collection of the public revenue, and on no better reasons than had been offered in support of the present application.

RICHARDS, *Chief Baron*, [having stated the object and terms of the application]. This motion appears to divide itself into two branches: the one arising from the circumstances of the particular case, the other from a necessary consideration of the effect it must have on the future practice of the Court, when the same circumstances may hereafter produce a similar application. In the latter respect, this motion is certainly one of very great importance, and therefore if I had any doubt upon the subject of the opinion I am about to give, I should take further time to consider that opinion; but I have no doubt on the subject.

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Although the motion comes before the Court, as if it were almost a matter of course, it is nevertheless certainly perfectly new. If we are to give credit to the note to the second case, cited from *Bunbury*, it must have been an ancient practice in this Court, for the crown to give a bill of particulars, before that practice had begun to prevail in suits between subject and subject; which is an absurd supposition. But it does not anywhere appear, that any such application was ever made to the Court for an order for such purpose, and on that account I cannot think that it ever was, in fact, the practice; and, indeed, if *Bunbury* be correct in his note added to that case, the Chief Baron, in ruling the point, as he is reported to have done, must have been wrong. There being therefore, in point of fact, no precedent for the application, I shall treat it as a perfectly new case.

It then becomes necessary that we should examine the grounds on which the motion is founded. [Here his Lordship stated the facts from the affidavit.] Now there is no particular or positive inconvenience stated to be the immediate effect of the generality of the charges which is complained of, nor is any even suggested. The defendant himself makes no affidavit. There is no precise allegation of any substantive evil arising to the defendant from the cause complained of, as that any of his witnesses have, in the mean time, died, or that any other such circumstance has occurred, to the injury of his cause. It is  
not

not even stated generally, that the defendant is obstructed in his means of defence. In truth, there is nothing at all positively stated, but we are left to infer whatever possible inconvenience we may. Then in what situation does the defendant actually stand? He is called on to pay the arrears of duties which he has not paid, and surely he must himself best know to what extent, if at all, such a charge is well founded, and principally by reference to his own accounts. But he chuses to call on the Attorney General to furnish him with particulars of the various frauds meant to be charged against him. Now there is certainly no instance of any such thing having been done by a court of law, in any case at all analogous, in the course of the now usual equitable practice, which has been adopted by the Courts in modern times. The application therefore being quite new, contrary to the course of practice, and without precedent, it becomes necessary that the applicant should make out a very strong case for the extraordinary interference of the Court, which he seeks, shewing that he cannot otherwise prepare a good defence, or, at least, that he could not safely go to trial without. But he does no such thing. In this particular case, therefore, it is quite clear, that there is no sufficient reason given to induce the Court to establish a precedent of new practice, in favor of this defendant.

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Then, as to the general principle, and what might be done in a case where strong grounds should be laid, for obtaining such an order, it is un-

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necessary for me to give any opinion, when deciding a case like the present, where there is really no foundation laid, in fact, for the application. The practice which has obtained in courts of law, arises from a notion of convenience adopted from the courts of equity, who would, on a proper case, always have done what is now more shortly effected by the more summary mode of an order of the judge—a practice, however, which even the courts of law now begin to think has been carried too far already. But what is the inconvenience suggested here, as affecting this defendant. He has not stated any himself, nor has it been taken up at the bar, on the ground of any actual inconvenience shewn to affect his case, and no prejudice can arise to him from the length of time which has elapsed, whether he have or have not actually committed the frauds imputed to him. On the contrary, all the inconvenience is on the other side.

There being no foundation then for calling on the Court, in this instance, to do what is required of them, that also renders it unnecessary to enquire whether the Court has any power to do so. But I may observe, that in the case of the Attorney General, if a bill of particulars should be ordered by the Court, it would be, in effect, so much waste paper, for the Attorney General would not be bound by any omission which he might make; and it is even admitted, that another information might be filed the next day, so that  
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the defendant would not be ultimately much benefited by it, if made. On that latter consideration alone the Court ought to refuse the order, for it is their duty to preclude any necessity, as far as in them lies, for multiplicity of informations. In fact, the only result of a bill of particulars would be, that considerably more paper would be employed, without furnishing any thing more substantially specific. The defendant's embarrassments would be augmented, and no sort of inconvenience would be obviated.

GRAHAM, *Baron*. It goes very far with me in the opinion I have formed, that there has been no instance brought forward, in practice, apposite to the present application, for I think that, with that view, we may put out of our consideration the cases which have been cited from *Bunbury*. The first is, a very short, imperfect, and loose report; but such as it is, the whole result of it comes to this, that the evidence given of the actual importation not having been confined to the time of the offence, as laid in the information, when that was made matter of objection, the Court threw out cursorily, that an application might have been made to the Court for the purpose of obtaining an order to that effect. Now, though that is the language attributed to a very great judge, yet it was not used on the occasion of a decision, and if an application of the sort had been made, the Attorney General might have put a short end to it, by amending his information. The case of *The Attorney General v. Hatton*, certainly goes

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somewhat further. Both, however, fall short of the principle contended for.

Then the defendant's counsel put the application on the ground of analogy, with the practice of courts of law, as adopted from the courts of equity; and if so, we must pursue that analogy, and see that a proper case be made out for our interference; but that has certainly not been done. The stress of the argument is, the length of time which this information professes to cover. But if the information had taken it up from a shorter distance of time, as from 1802, there would, it should seem, have been no objection taken: then where are we to draw the line? Another answer to the arguments, founded on the same basis, is, shall a defendant call for the interference of the Court in his favor, because his conduct has made it necessary? As to its being put, that this is no more than a common case of debt, that is not so. It is a charge of fraud upon the crown, to the injury of the public revenue, to an unknown extent, and that from day to day, during all this length of time: and yet that very length of time, which is in itself an aggravation of the fraud, in all respects, is now sought to be made a means of advantage to a defendant, in procuring on his behalf an indulgence, by means of the interference of this Court, and for no other reason than that the frauds have not been discovered till of late. It is quite manifest, that if he has any reason to complain, he has brought it on himself, and if the burthen is heavy, it is he alone who

has

has made it so. The same answer may be made to the representation of the difficulties in which the defendant becomes placed by the generality of the charge. [His Lordship then adopted much of the argument used by the counsel for the crown.]

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Then again, we cannot but take notice of what is quite obvious, that it is really impossible for the Attorney General to do what is required of him: and that would therefore put an end to the proceedings, whereas nothing is more easy than for the defendant to furnish himself with all the information that he can require, from his own accounts. There is no doubt that, if he is guilty, he well knows to what extent, and on what occasions; and if innocent, it cannot be necessary, and all the burthens is, in the first instance, on the crown. He has thus every opportunity of defending himself against the charge, however general it may be, and much more than the Attorney General can have of substantiating it.

I cannot admit that this is a case, where the crown being the party, is to be considered as in the situation of an individual having a personal interest in the suit. 'The crown' is merely a phrase importing the legal concentration of all the subjects of the realm, whose private rights are injured by delinquents in revenue matters, and they are, in fact, the party who contend with the particular individual. In such a case the Court is bound to protect the public interest, and to see that the  
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duties which they have to perform in the administration of justice, are not embarrassed by factitious difficulties, and to obviate whatever else may tend, by creating inconvenience, to obstruct the officers of the crown in the fair exercise of their high and important duties, or put them to unnecessary expence or delay in the course of their proceedings,

WOOD, *Baron*. I confess I have all along entertained great doubts on the present question, and I certainly think that the application ought to be granted to a certain degree. However much I may incline against all frauds of every description, which I do as strongly as any man, I yet think that every subject has a right to know the full extent of any charge which may be brought against him, and to be informed of what he is called upon to answer, in order that he may be better enabled to prepare himself fully with his defence,

This information charges that the defendant is indebted to the crown for large arrears of duties. It has been said, that the statement in the information is in itself a particular, and so it certainly is to a given extent, because it states times and sums, but then the periods are tolerably long ones, and the sums pretty large. But it says in fact no more than that so much money is owing from the defendant to the crown, for duties accruing for so many as thirty years, without charging any particular fraud during all that time. Now that is certainly a charge of itself which it is somewhat

what laborious to repel, and more particularly where, as here, the defendant has two distinct and distant concerns. The consequence must be, that he might be obliged perhaps to collect and bring to the trial all his servants whom he may have employed during all that time, at both breweries, and that I consider a difficulty which ought not to be imposed on any man. There is no limitation as to the time of proceeding for arrears of duties, although there is in the case of penalties. In suits for penalties too, a defendant has also the advantage of having every thing material specifically stated on the record.


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Then it is said, that there is great difficulty in doing what is now required of the Attorney-General in cases of this sort. There is no doubt that that is so, but still I say that something may be done more than is furnished by this record, although not coming up to all that is asked by this motion, and that would be more satisfactory. It may be done too without admitting that the whole duties for the years not mentioned in the particular, have been in fact paid, so that the defendant might still be afterwards sued for any arrears which might be subsequently discovered.

It has also been said, that the Court has no power to do what is sought by the application as against the Attorney-General proceeding on behalf of the crown. If there be any such prerogative as denies that right, it is entirely unknown

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to me, and I think that if the Court saw that it was expedient to grant the order prayed, there is no doubt that they have the power to do so,

That a mistake of the Attorney General does not bind the crown, is certainly true, but that does not militate against the principle of this application, or in any way operate against granting the object of it, if the Court should think proper to accede to it.

In civil cases, it is now the general practice in all the Courts, although it was not so formerly, (and therefore there could have been no precedent for it when the application was first made), to compel a plaintiff to give the defendant a bill of particulars of his demand. It is a practice founded on convenience, and I well remember the beginning of it. There are also inconveniences attending it certainly, and it is no doubt often required for the mere purpose of delay; but those inconveniences are greatly overbalanced by its beneficial effects. On that account it was adopted in practice in the Court of King's Bench; then by the Court of Common Pleas, and this Court, and in all without precedent. The same answer as has been given to this application might have been given in the first instance in all those cases. It might have been said that it never had been done before, but where it is proper or just to do it, that should not be received as a conclusive answer. In a recent case, on a motion made for taxing a crown solicitor's bill, it was urged, that there

there was no precedent for it, and that it never had been done, yet the Court notwithstanding made an order that it should be taxed.

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I think certainly that a somewhat more specific particular should be given by the solicitor of excise, and which, though perhaps difficult, may be effected so as to give the defendant a general idea of the charge to be attempted to be established against him, or at least of the nature of it, to assist him in preparing for his defence; and in making the order, it will not be necessary to tie them down very strictly as to dates, or other minute particulars, but there should be some guide furnished, which may be at least much more particular than this information.

GARROW, *Baron*. When the present application was first made to the Court, I had considerable doubts whether we ought to grant the rule; however, I concurred, because I thought the question of great importance, and well merited to be fairly and fully discussed. I now think it quite clear that the rule ought to be discharged, for I am of opinion that there is nothing tenable in it. There is no precedent for it, nor is there any such practice. And as to the principle said to be deducible from the cases which have been cited from *Bunbury*, they do not furnish any authority, because it does not appear that any such application as is alluded to there was ever even made to the Court, which not to have happened in matters of this nature, is almost conclusive against

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against the probability of its success. It has been said, that it has not been common to file informations over-riding so great a length of time. If that were true in point of fact, it would be no answer on a question as to the right. It is also stated, that this species of information is ~~nothing~~ more in point of form than a proceeding to recover a debt—a legal demand of so much money due. Whatever it may be in point of form, in substance it appears to me to be founded on conduct very different from that which gives rise to demands in courts of law for money due to a plaintiff. A man is daily putting into his pocket the revenues of the crown for a great number of years, to an enormous amount, and the fraud is not detected till after the whole lapse of time, (and who is there that is to learn that in revenue cases that is a matter of very frequent recurrence?) and when at last his frauds are discovered, he relies on the great length of time during which he has been practising them.

As to the cases which have been cited, it would be matter of great astonishment to the Editor to find them cited for the purpose of inducing the Court to grant the present application. Nothing can be more inapplicable than those cases. But if a particular should be furnished in a case of this sort, what would it be more than to accumulate charges of substruction on substruction, till the defendant would be much more embarrassed with than without it. The only chance of benefit which the defendant could hope to derive from such

such a measure, would be, that some variance might arise on the trial between some parts of a voluminous particular and the evidence. His Lordship concluded by saying, that if any thing short of a circumstantial detail of particulars would suffice, that had been furnished already by the information.

*Per Curiam.*

Rule discharged.

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The *Lord Chief Baron* expressed a wish that he might not be understood as saying that the ground on which he refused this application was, merely because it was without precedent; for, on the contrary, in a proper case, even between the crown and the subject, he would say, as Lord *Hardwicke* had done, that he would make a precedent; but that his principal reason was a determination not unnecessarily to embarrass the proceedings of this Court, by granting such a motion in a case like the present.

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4th February.

PARTRIDGE and Wife Administratrix, &c. *v.*  
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Demurrer.

Counts, on promises made to an intestate, may be joined in a declaration by an administrator in an action of assumpsit on such promises, with counts, on promissory notes given to the administrator since the death of the intestate, as administrator because the amount, when recovered, would be assets in the hands of the administrator.

*Semble secus*, if a bond, or other higher security, had been given, because the effect of such new and higher security would be an extinction of the simple-contract debt.

And *semble*, that an administrator *de bonis non* might claim on such promissory note, against the *prima facie* right of the personal representative of the administrator of the intestate.

THE declaration stated, that *Philip Partridge* and *Mary* his wife, (which said *Mary* was administratrix, &c. of *Dennis Bradley*,) complained, &c. For that whereas the defendant, in the life-time of the said *Dennis*, &c. was indebted to the said *Dennis*, &c. for money lent and advanced—paid, laid out, and expended—and had and received. Promises to the intestate in his life-time—Breach non-payment to intestate in his life-time, or said plaintiff and *Mary*, &c. since his decease.

The 4th and 5th counts were founded on two promissory notes, given after the death of the said *Dennis*, whereby the defendant promised to pay, six weeks after date, to the said *Mary*, as administratrix, &c. two several sums of money, with interest—promises to the husband and his wife, as administratrix, &c. And there were other counts for money paid—money had and received—and on an *insimul computassent*.—In all the counts the wife was described as “administratrix, &c.”—common breach—non-payment to said *Philip* and *Mary*, &c. or either of them.

Demurrer—

The Court will not permit a defendant to withdraw and amend after a demurrer has been argued.

Demurrer.—For that the said *Philip* and *Mary* had declared against the defendant for the non-performance of certain promises and undertakings, made by the said defendant to the said *Dennis* in his life-time, in respect of certain causes of action accruing to him, the said *Dennis*, in his life-time: and also for the non-performance of certain other promises and undertakings made by the said defendant to the said *Philip* and *Mary*, after the death of the said *Dennis*: and also, for that the said *Philip* and *Mary* had joined in the said declaration causes of action, which, by the laws of this land, cannot be joined in one declaration.

### Joinder.

*Littledale*, in support of the demurrer, contended, that the present case was wholly distinct from the class of decisions\*, which had determined, that—counts for goods sold, for money lent, &c. &c. by a testator on intestate, might be joined with a count, or an account stated with the executor or administrator; for all such counts were consistent, and in joining them one right only would appear on the record, and the money, when recovered in all those cases, would be assets; whereas in this case a new security

\* The leading decisions on that point are cited in the argument in support of the declaration, *infra*, p. 416.

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was taken, which not only gave the administratrix a right to sue in her own name, but made it absolutely necessary. And he cited on that point the case of *Betts v. Mitchell* (a), where the plaintiff, an executor, declared on several promises to the testator, and also on a promissory note given to him, *ut executori*, for a debt due to the testator, and made payable to the plaintiff, or order: and on demurrer the Court held, that that promise was of such a nature, as that it could not be joined with promises to the testator. In that case (he observed) it was submitted in argument, and adopted by the Court in delivering judgment, that though the note was made to the plaintiff as executor, *that* was only a description of his person—that promissory notes being transferrable, might be endorsed, so as to give another a right of action: and that the plaintiff might have brought an action on the note, without naming himself executor. It might be contended here, as there, that this was as much a new contract as if a bond had been given to the plaintiff for the money; and this note would go to the personal representative of the administratrix, and not to the administrator *de bonis non* of the intestate.

He also cited, as a very recent decision on this point, the case of *Hosier and another, executor of Hosier, v. Lord Arundell* (b), where it was held that a count on a bond given to a testator, could

(a) 10 Mqd. 316.

(b) 3 Bos. & Pul. 7.

not be joined in an action brought by the executor, with a count on a bond given to him as executor; and, in that case, Mr. Justice *Chambre*, in delivering judgment, said expressly, 'If executors *take a note* or bond from a creditor [*debtor*] to the estate of their testator, the old debt is thereby extinguished, and a new one created, which must be declared upon as such.' Another reason given by Lord *Alvanley* in the same case is, that the costs could not be severed, and the plaintiffs would be liable to costs on one count, and on the other they would not. He submitted besides, that the same plea could not be pleaded to this declaration, for the defendant could not plead to the action a set-off of a debt due to him from the testator, (*Shipman v. Thompson (c)*), nor would the judgment be the same.

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*Chitty*, in support of the declaration, contended, that the counts were properly joined, for that the money received on the note would be assets in the hands of the executor. The counts on the note, being expressly laid in the plaintiff's character of administratrix, he submitted, might be joined with promises made to the intestate, because, he contended, the note given did not alter the nature of the debt, but only more clearly ascertained its existence and amount, and was, in effect, only the common result of a settlement of accounts, and was therefore no more than an *insimul computassent*, which all the cases deter-

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mined might be joined with promises to a testator, although the account stated was alleged to be with the executor, *Cowell & Ux. administratrix, &c. v. Watts (d), Thompson & Ux. executrix, &c. v. Stent (e)*,—*Powley and others, executors of Powley v. Newton (f)*; and in *Ellis v. Bowen, executor (g)*, the converse was held.

The case cited for this demurrer from *Mod. Rep. of Betts v. Mitchell*, he submitted, had been subsequently over-ruled by that of *King and others, executors, &c. v. Thom (h)*, where it was determined on special demurrer, that the plaintiffs, to whom a payee of a bill of exchange had endorsed it, *as executors*, might declare as such in an action against the acceptor. And he distinguished the present case from that of *Hosier v. Lord Arundell*, by the circumstance of the executors in that case having taken a *bond* from the debtor, which made it a new debt to him in his private character, and that distinction was made the groundwork of Mr. Justice *Rooke's* opinion, in the judgment delivered by him. He said, 'Where executors change the nature of the debt due to their testator, after their testator's death, they must sue for the *new* debt in their own name, and not in their character of executors.' In this case the note was given for the same debt as was due to the intestate, and it is competent to a party to go into the consideration of a debt, notwithstanding

(d) 6 East, 405.

(e) 1 Taunt. 322.

(f) 6 Taunt. 453,

(g) Forrester, Exch. Rep. 98,

(h) 1 T. R. 487.

he have given a promissory note, (*Trueman v. Hurst (i)*). It was also much relied on, that the note in question was not made payable to order.

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Then it was submitted, that the plaintiff would not be liable to costs, if he should fail in the action on this promissory note, on the general rule in favor of executors; and, on the whole, that there was no objection, either in principle or authority, to joining the counts of the declaration, as they stood on this record.

*Littledale*, in reply, observed, that in none of the cases cited in support of the declaration, had there been a promissory note given by the debtor, or any *new* security, and on that circumstance this demurrer mainly rested. In the regular course, a promissory note would go to an administrator along with the administration, and not to the administrator *de bonis non*; and though it was given to the plaintiff, as administratrix, she must have endorsed it in her own right. He dissented from the proposition, that this note was assets in the hands of the administratrix; and submitted, that nothing appeared on this record, from which it could be collected that it was part of the effects of the deceased, or it might have been the only effects of the intestate, and the wife, as administratrix, might have retained the note in satisfaction of a debt due to her, which she would have had a right to do. In all the cases cited,


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on the other hand, it appeared on the face of the pleadings, that the money, when recovered, would have been assets; and in the case of *King v. Thom*, which was so much relied on, the joinder of the counts was not made the question on the demurrer: the only point was, whether the action could be supported. The authorities of *Bett v. Mitchell*, and *Hosier v. Lord Arundell*, proceeded on the principle of the debt having been changed in its nature by the new security, and that from having been due to the executor in his representative character, it had become due to him personally: and for these reasons, he submitted, that the declaration could not be supported.

GRAHAM, *Baron* [having fully stated the pleadings, and the objections raised by the demurrer]. It has been contended, that these several counts are inconsistent, and that not being open to the same plea, or the same judgment, they cannot therefore form one entire record. Up to a certain period, the case from *Modern Reports*, cited in support of this demurrer, might have served as an authority that such counts as these could not be joined, as being founded on distinct claims, the one in a personal, the other in a representative character. But the later cases, and particularly that of *Cowell v. Watts*, founded on the old cases in *Levinz*, have brought the question more fully before the Courts, and from the opinions of the several judges who have given their reasons at some length, it is to be collected, that a rule is now completely established, that

that wherever the money when recovered shall be assets, counts in each character may be joined, and that is a fair and sound criterion, and one which is sufficient to prevent all ambiguity and doubt: it ought therefore to be adopted as a never-failing rule.

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Then we should look to this record with a view to see whether the money which is sought to be recovered would be assets in the hands of the administratrix, and in my opinion I think the judgment for the plaintiff would be conclusive, if produced, to shew that assets had come to her hands, and might be used for that purpose.

We were certainly puzzled with the argument, that a promissory note, being purely personal, would go to the representative of the executor or administrator, and not to the administrator *de bonis non*, but I think that it would be fair evidence to use in the ecclesiastical court in obtaining administration *de bonis non*, which would withdraw it from the personal representatives of the administratrix.

The two cases which have been pressed on us in behalf of the demurrer, certainly raised great doubt in my mind; but on consideration I cannot but think that Mr. Justice *Chambre*, in the case of *Hosier v. Lord Arundell*, carried his opinion too far in putting a promissory note on the same footing, in a question of this nature, as a bond. In that case where a bond was given to the executor

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in his own name, I think the judgment right, because such a specialty would have the effect of annihilating the previous debt, creating a new and personal obligation of a higher nature: and therefore I am obliged to say with deference, that I cannot hold the opinion of Mr. Justice *Chambre* to be right, in putting a promissory note on the same footing as a bond.

Then this case is much strengthened by the circumstance of the note given being payable to the administratrix, expressly as administratrix, and therefore it could not have been negotiated. It is still further an answer to the proposition said to have been stated by Mr. Justice *Chambre*, that a promissory note having been given would not preclude the defendant from going into the consideration, whereas it is not so in the case of a bond. The former does not change the nature of the debt, and is in fact very little stronger than, or different in effect from an account stated, and may therefore be declared on as if it were a common count of *insimul computassent*. The defendant's arguments, therefore, do not impugn the later decisions, which have held, that that count, in the person of an executor, may be joined with others on promises to a testator. There is as much of new contract in the one case as the other: the only difference is, that the promissory note puts the acknowledgment in writing. The main difficulty in this case is the position laid down by Mr. Justice *Chambre*, in the case of *Hosier v. Lord Arundell*, and having got over that,

that, I think there should be judgment for the plaintiff.

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WOOD, *Baron*. The objection to this declaration is, that it contains several counts which are distinct, and cannot be joined, some being framed on demands in the plaintiff's representative character, and others on demands which should be asserted by her personally, and no doubt if that were so, the declaration would be bad; but I am of opinion that all these counts are on demands arising to her in her representative character, and not in person.

The true criterion of that is certainly what has been already stated, that where the money, if recovered, would be assets, the causes of action may be joined, and in this case I take it that the money, when recovered, may be clearly so considered.

There have been two cases cited against that opinion. The first, from *Modern Reports* (*k*), is certainly in point to that effect; but I consider that case to have been since properly over-ruled by subsequent decisions, and on very good grounds. The next case (*Hosier v. Lord Arundell*) I think is entirely distinct from the present, because there a bond had been given, the effect of which is to extinguish simple-contract debts.

(*k*) *Betts v. Mitchell*.

But

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But this is a very different thing; and if the plaintiff had not declared on the promissory note, they might have given it in evidence on the count of *in simul computassent*, in support and proof of that count. That is a strong criterion by which it may be determined that the money recovered would be assets, for there can be no doubt that money recovered by an administrator, on an *in simul computassent*, would be assets. The main and only difference is, that the note bears interest, but then it is given for value received from the intestate, and it is given to the administratrix as administratrix, and that is not merely, as has been argued, a description of the person, it is a description of character, and of the character in which the debt is to be paid to her. Thus it appears on the record, as it must in evidence, that the cause of action accrued in the life-time of the intestate, and the subsequent transaction does not change the original right.

Then it has been said, that this note would go to the representative of the administratrix, and not to the administrator *de bonis non*. I differ entirely in opinion from that proposition, and think that in some way or other he might recover on this very security. A bond certainly is a very different matter, but this sort of acknowledgement is not in point of law a security of a higher or different nature than the original debt, and therefore I think the plaintiff is entitled to judgment.

GARROW,

GARROW, *Baron*, concurred. This question has certainly in effect been already decided by very many of the judges. The main question is undoubtedly whether the money sought, when recovered, would enure to a different fund than that in right of which the plaintiff sues, and I think it clearly would not, and that the plaintiff could only recover on these promissory notes in his representative character—that it would be part of the intestate's estate, and would be liable to his debts,—and that the plaintiff might be charged with it in answer to a plea of *plene administravit*. The case of *King v. Thom* has over-ruled that of *Betts v. Mitchell*, and it is altogether on this point quite decisive with me. (His Lordship stated the case.)

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It was urged in argument, that a plea of set-off, for money due from the intestate to the defendant, could not be pleaded to these counts on the promissory notes given to the plaintiff. I think otherwise, however, and that such a plea, founded on a debt due from the plaintiff, could not be pleaded to those counts.

In the case of *Hosier v. Lord Arundell*, Mr. Justice *Chambre* was not called on to go so far as he is represented to have gone, and I cannot, therefore, consider any thing said by him on that occasion as deciding at once the case now before us. That was a question arising on a bond given to the executor, and was therefore totally  
 different

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different from the present, where no new character was given to the original debt as due to the intestate, by what has been done, as was the case where the executor had taken the debtor's bond.

*Per Curiam.*

Judgment for the Plaintiff.

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It was then asked of the Court, as matter of indulgence, and in consideration of the novelty and difficulty of the point raised by the demurrer, that the defendant might be at liberty to withdraw and plead.

But the Court refused to permit it, giving as a reason, that it was a rule not to grant such an indulgence, where the demurrer has been argued, and judgment given.

## IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, L<sup>d</sup>. CH. BARON.

The ATTORNEY GENERAL, on the relation of  
JOHN PHILLIPS, informant, v. FREEMAN and  
another.

1818.

Thursday,  
5th February.

THE guardians of the poor of St. Luke's under  
a local act of parliament\*, had claimed on an  
advertisement on a decree in this cause, for  
legatees under the will of a testatrix, who had be-  
queathed (after certain legacies) all the rest of  
her money, and securities for money, to the de-  
fendants,

Construction  
of devise with  
reference to  
an act of par-  
liament.

Money be-  
queathed to  
trustees, to lay  
out the same,  
and pay the in-  
terest and divi-  
dends to the  
poor inhabit-  
ants of a parish  
for ever, by half-  
yearly pay-  
ments—claim-  
ed under a  
local act of  
parliament,  
enacting that  
all gifts, dona-  
tions, benefac-  
tions, and sums  
of money, which  
should there-  
after become  
payable to the  
use of the poor  
of the parish,  
not being di-  
rected or lia-  
ble to be ap-  
plied for the

\* Enacting, that 'all gifts, donations, benefactions, and sums of  
money whatsoever, now payable, or which shall hereafter be-  
come payable for and to the use of the poor of the said pa-  
rish, *not being directed or liable to be applied for the support*  
of any private or particular poor or charity, or by the respec-  
tive donors, *or otherwise particularly appropriated*, and not  
being sacramental money, shall, from time to time, be paid into  
the hands of their treasurer for the time being, for the use of  
the poor of the said parish, to be applied in aid of the rate  
for the relief of the poor thereof, unless the said guardians  
shall think proper to appropriate and apply the same, or some  
part thereof, to and in relieving or assisting any indigent,  
poor, aged, or industrious persons, who have not become  
chargeable to the said parish.'

support of any private or particular poor or charity, or by the respective donors, or *other-  
wise particularly appropriated*, and not being sacramental money, should be paid into the  
hands of the treasurer of the guardians of the poor, thereby appointed in aid of the rate,  
with power to appropriate it to indigent persons, who had not become chargeable—held  
on a claim by such guardians of the poor to be within the exception of the private act, as  
being a gift particularly appropriated by the testatrix.

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defendants, ‘ In trust, to lay out the same, and pay the interests and dividends to the poor inhabitants of the parish of *St. Luke* for ever, by half-yearly payments; and on the decease of either of them, (the defendants, the appointed trustees,) then that the survivor appoint other trustees in the parish, and so from time to time, as often as the trustees to be appointed as aforesaid shall, by death or resignation, be reduced to two.’

That claim having been disallowed by the Deputy Remembrancer, the claimant excepted to his report, and the exception was now supported by

*Dauncey* and *Shadwell*, who contended that the act of parliament had vested this bequest in the guardians which it had appointed—and that it did not come within the excepted cases in the act, which had reference entirely to the beneficial enjoyment of the *sum* bequeathed, and not to the persons to whom it was nominally to be paid. And they submitted, that if the advantage of the charity were a matter of consideration on such a question, a corporate body appointed by law was a much safer custody in all respects than individuals, who would be more likely to misapply the funds.

The *Lord Chief Baron* [without hearing the counsel for the defendants], I am, in fact, called on to set aside this will, and to give the property  
 of

of the testatrix to the guardians of the poor of this parish, notwithstanding she has herself made a selection of the persons to whom she has chosen to entrust the distribution of it in charity. This is clearly an appropriation by the testatrix within the exception of the statute. The guardians must not have a power to select the objects of the testatrix's charity, in exclusion of the trustees of her own appointment, to whom she had expressly confided that duty.

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and another,

Report confirmed,

The

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Friday,  
6th February.

The KING v. LAMBTON and others. On an  
Extent.

Demurrer.

A parcel made up by a banking-house, sealed, and addressed to another banking-house, containing cash-notes and cheques of the latter, and bills of exchange, specially endorsed to the former, to make up a balance due from them on their general account, and deposited on the 3d July, after the bank was shut, with a woman-servant left in care of the banking-

house, to be given to the postman in the morning of the 4th, who was in the habit of calling for such parcels before banking hours—held to be seizable under an extent in aid, tested 2d July, returnable 6th November, on special demurrer to a plea, stating those facts, and tendering issue on the property; and that although the inquisition, finding the debt due to the debtor of the crown debtor was not taken till the 4th of November following.

Because such circumstances do not amount to a delivery of the parcel to the persons to whom it was addressed, or their agent, and therefore confers no right of property. *Aliter* if delivered to the postman.

A writ of extent binds from the *teste*; and such property as bills of exchange is bound, while in the custody of the debtor.

A special endorsement does not transfer property in bills of exchange till delivery.

The contents of such a parcel, while remaining in the banking-house, under such circumstances, remain there at the risk of the bankers who made it up, and is still subject to their controul.

It is sufficient, in such a case, if the defendant traverse the property of the debtor to the crown's debtor, 'at the time of the seizure, or of taking the inquisition;' and it is not necessary to say, 'at the time of the issuing of the extent.'

small charge of 2s. 6d. for noting a bill for them, which was delivered to the said *John Cooke*, on the same day, about one or two o'clock. That the above parcel, with two cheques, amounted to 2039*l.* 18*s.* That when the above parcel was received by the said *John Cooke*, he (*Cooke*) held cash-notes of *Lambton* and Co. to the amount of 931*l.* and two cheques drawn by *Robert Reay* upon *Lambton* and Co. for 165*l.* 12*s.* 3*d.* making together 1096*l.* 12*s.* 3*d.* and then had no other claim upon them. That after deducting the sum of 1096*l.* 12*s.* 3*d.* the amount of *Lambton* and Co.'s cash notes and *Reay's* cheques in the hands of the said *John Cooke*, there was a balance of 943*l.* 5*s.* 9*d.* due from the said *John Cooke* to *Lambton* and Co. if the cheques upon, and the cash notes of the said *John Cooke* sent by *Lambton* and Co. could be considered as a payment of the cash notes of *Lambton* and Co. then in the hands of the said *John Cooke*. That the said *John Cooke*, on the same day, and in return for the cheques and parcels of cash notes received from *Lambton* and Co. made up a parcel for *Lambton* and Co. of the above cash notes of *Lambton* and Co. and which were particularly specified and described in the schedule thereto annexed, marked B. and *Reay's* two cheques, amounting together to 1096*l.* 12*s.* 3*d.* and of six bills of exchange upon *London*, to the amount of 946*l.* 7*s.* which said cheques and bills were also particularly specified and described in the schedule thereto annexed, marked C. which was 3*l.* 1*s.* 3*d.* more than the amount previously remitted by *Lambton*

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and Co. the said John Cooke having no ready drawn bills to come nearer the balance. That all the above bills were specially endorsed by the said John Cooke to Lambton and Co. as follows:—“Pay Messrs. Lambton and Co. or order by procuration of Cooke and Co. H. Tanner.” That the said parcel, with the above contents made up by the said John Cooke, was sealed up and directed to Lambton and Co. Newcastle, by H. Tanner and B. Armstrong, clerks of the said John Cooke. That on the same day an account of the transaction before mentioned was stated and closed in the books of the said John Cooke, with the balance of 3*l.* 1*s.* 3*d.* to the debit of Lambton and Co. to be settled for next exchange day. That the parcel was taken out of the bank-office by the said Armstrong, in the afternoon of the 3*d.* July, and delivered to Alice Ovington, the servant of the said John Cooke, in the house where the said bank-office was kept. That the clerks soon afterwards locked up the bank-office, and went to their respective homes. That the parcel was left with the said Alice Ovington, as usual, to be delivered to the postman when he called, which was usually near seven o'clock in the morning. That a little before seven o'clock in the morning, of the 4*th.* day of July, there was a rap or ring at the house-door of the said John Cooke, and the said Alice Ovington believing it to be the postman calling, as usual, for the parcel, took it in her hand, and upon opening the door it was seized and taken from her by the sheriff. That the above was the usual mode of making the exchange between

tween the two banks. That at the time when the balance was struck by the said *John Cooke*, and the amount closed as between them and *Lambton and Co.* and also at the time of making the special indorsement on the *London* bills before specified, and delivering the parcel to *Alice Orington* for the postman, for *Lambton and Co.* the said *John Cooke* was entirely ignorant of an extent having being issued against him, and that the several acts above-mentioned were done by him without contemplation of bankruptcy, or of stopping payment, and in the usual course of his business.

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To that inquisition the defendants *Lambton and Co.* pleaded, 'that the said *John Cooke*, long before, and at the time of the teste, and issuing the said writ of extent against the said *John Cooke*, and long before, and at the time of the seizing of the said cash-notes, cheques, and bills of exchange, mentioned in the said inquisition taken before the said sheriff of *Durham*, upon the said writ of extent, was a banker at *Sunderland*, in the county of *Durham*, to wit, at *Westminster*, &c. carrying on business under the stile and firm of *Cooke and Co.*; and that the said defendant, *Lambton and Co.* long before, and at the said several times last aforesaid, and long afterwards, were bankers at *Newcastle-upon-Tyne*, to wit, at, &c.; and that the said *John Cooke*, and the said *Lambton and Co.* being such respective bankers as aforesaid, they, the said *John Cooke*, and the said *Lambton and Co.* before and up to the

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the times of the *teste*, and issuing of the said writ of extent, and of the said seizures by the said sheriff of the county of *Durham*, were in the habit of exchanging their cash-notes and cheques belonging to each other, on *Wednesday* in each week, except that they did occasionally, when they received cheques of each other's customers, which they deemed in any degree dubious, send them over to each other more frequently, and when they did so, they were accounted for in making and settling the exchange on the usual exchange-day, and that the difference in amount between the notes and cheques of each house of the said respective bankers, *was settled by bills on London, to wit, at Westminster, in the county of Middlesex* aforesaid.'

And the defendants further alleged, 'that *the said exchange of the said cash-notes, cheques, and bills of exchange*, so made between the said *John Cooke* and the said defendants, as such bankers as aforesaid, were *made through the medium of a postman, or messenger, who resided at Sunderland*, and left that place for *Newcastle* daily, about seven o'clock in the morning, and returned about one o'clock at noon. And the defendants further alleged, that *on the 1st or 2d day of July*, in the year of our Lord 1816, they sent over to the said *John Cooke* two cheques, amounting to 266*l.* 15*s.* 6*d.* drawn upon the said *John Cooke* by the customers of the said *John Cooke*, and for which cheques the said defendants had given value, and were to receive it back again on the day of exchange,

exchange, either in cash, notes, or bills upon London.' And the defendants further alleged, (stating the above facts, as found by the inquisition,) 'that by reason and means of the premises, the property in the said cash-notes, cheques, and bills of exchange, together amounting to 2042l. 19s. 3d. became, and were, and continued the property of the said defendants. Without this, that the said Cooke, at the time of the seizure of the said, &c. or at the time of the taking of the said inquisition to the said writ of extent against the said Cooke, had any property in, or right to the said cash-notes, cheques, and bills of exchange. *Parati verificare*. Wherefore they prayed judgment, and an *amoveas manus*.'

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To that plea the Attorney General had demurred, and the defendants joined in demurrer.

Nolan, in support of the demurrer, submitted, that the two questions raised by these pleadings were, first, whether the facts which the defendant had put on the record, shewed such a sufficient title in himself as traversed that of the crown, whose right (he insisted) might be established merely by the weakness of a defendant's title. And he contended, that the debts of the crown's debtor were bound from the *teste* of the extent, and that all his property, not absolutely, and completely divested at that time, remained liable to seizure. He cited *The King v. Cotton* (a),

(a) Parker, 112.

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Stringfellow's

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*Stringfellow's* case (b), and *Reg. v. Arnold* (c), *The King v. Wynn and Parry* (d), and *The King v. Wells and Allnutt* (e). In some of those cases the crown was held entitled to property seized, after a distress levied, where the goods had not been actually sold, and in others, the last particularly, goods taken by the sheriff under a *fieri facias*, were held bound, where there had not been a sale, although the writ of extent bore *teste*, after the delivery of the writ of *fieri facias* to the sheriff.

The second question he submitted was, whether the intention on the part of *Cooke*, to appropriate the contents of the parcel, and what had been done by them in furtherance of it, and the indorsement of the bills of exchange had given *Lambton* and Co. such a right, as enabled them to set up the present claim against this extent: which he contended it did not, for want of an actual delivery to the defendants, without which the indorsement of the bills of exchange did not pass the property or interest in them; and he insisted that nothing had been done by *Cooke*, which could be considered as even tantamount to a delivery to *Lambton* and Co. The parcel was never, at any time, out of *Cooke's* custody or controul, and if the contents of the parcel had been stolen or destroyed, it would have been *Cooke's*

(b) Dy. 609.

(d) Bunb. 39.

(c) Vin. Abr. Tit. Creditor  
and Banker, Z.

(e) 16 East, 278.

loss;

loss; and the female servant, in whose possession it was found, could not, in any sense, be considered as the agent of *Lambton* and Co. as the postman, if it had been delivered to him, might, perhaps, have been.


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[To a question by the Court, on the right of the crown to sue the acceptors of the bills of exchange, it was answered, that for the present argument it was only necessary that they should have been seized (as they had been) as so much paper merely, and therefore that question did not now arise: the crown acquired the same sort of property in the bills as *Cooke* had had, and he had such a property in the parcel, and its contents, as would have supported trover, if they had been lost.]

It was also objected, that the plea had not effectually traversed the title of the crown, and that the inducement to the traverse was wholly insufficient, for that instead of denying that *Cooke* and Co. had any property in the cash-notes, &c. at the time of the seizure, or at the time of taking the inquisition to the writ of extent against *Cooke* only, it should have carried the denial to the time of issuing the (original) writ of extent\*; for taking it as it stands, the inducement is, that *Cooke* and Co. had endorsed the bills, &c. on the 3d of July, whereby the defendants acquired a

\* Quere, if not matter of law, and therefore not necessary for the defendant to traverse it. *Sir Edward Dilmock's case*, Lane, 64.

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property therein; and the traverse is, that *therefore, on the 2d, Cooke and Co. had then no property therein.*

He submitted, that the debts due to the crown debtor, or to his debtor, at the time of the extent, and all property of which either of them shall have become possessed or entitled to subsequently, are bound by the *teste* of the original writ, and not merely from the taking of the inquisition against the debtor of the crown's debtor, and that that point was fully settled by the decision in the case of *The Queen v. Arnold (f)*.

*Littledale*, in support of the plea, on the objection taken to the terms of the traverse, observed, that the defendants could only traverse such matters as were relevant and consistent with their defence—that they had done so—and that their traverse was material and issuable. They had certainly admitted *Cooke and Co.* to be possessed, at the time of the issuing of the extent, or otherwise they must have failed in proving their issue; but they have traversed the title of the crown, or found by the inquisition, of the 4th of *November*, against *Cooke and Co.* And he urged, that in extents in aid, debts in the second degree are not bound by the *teste*, but from the day of taking the inquisition against such debtor, as was held in the case of *The King v. Green (g)*; and the reason is, because the party has no notice

(f) As cited in West on  
Extents, 327.

(g) Bunb. 265, and West,  
329, S. C.

of the process, and is necessarily ignorant of the time when it bears *teste* : and had such writs relation, in all cases, to the day when they were tested, it must destroy all confidence in the general course of dealing between one subject and another. The principle of the cases which had been cited he admitted, but the distinction, he insisted was, that although the *teste* of the writ bound the property, yet where the property has been altered between the *teste* of the writ, and the taking of the inquisition, the writ does not reach the goods ; but neither a *feri facias*, nor a distress without sale, alters the property in goods. In a subject, who has knowledge of an extent issued, transferring the property in his goods, is a fraud, but where there can be no knowledge there can be no fraud. A debt having been found by inquisition, although it becomes thereby a debt of record, is not notice.

It was then urged, that the *nature* of some of the property which had been seized under this extent (the bills of exchange) was such that it could not be considered as bound ; for as to the argument of a property in the paper, that could hardly be seriously put. The cheques too had been discharged, and were no longer of any value.

The bills were *choses in action*, and were specially endorsed to *Lambton* and Co. and if seized would not be available against the acceptors, in the hands of the crown, but *Lambton* and Co. had acquired by the endorsement *Cooke's* right to demand

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mand payment from the acceptors. If a *bona fide* endorsement between the *teste* of the writ and the seizure should not be held to be good, it would put an end to the free negotiability of bills of exchange. To put an instance of the probable inconvenience of such a state of things, it was supposed that these bills had already passed through many hands. As well (it was said) might it be urged that the money paid by *Cooke* in the course of the day, for the necessaries of his house, might be taken from the several trades-people by whom he had been supplied. On the whole, it was pressed, that the principle of the authority of *The King v. Green*, was strongly in the defendant's favour on this point. In that case, as here, the debt was paid between the *teste* of the extent and the finding of the inquisition.

On the second question, whether the delivery of the parcel in the manner found by the inquisition was a delivery to *Lambton* and Co. it was contended, that under the circumstances of this case it was: for they made the servant of *Cooke* the servant of *Lambton* and Co. *Cooke* had done all he could to transfer the property, and that in conformity with an agreement which had been long acted on. The bank had closed on the whole transaction, and would not open till after the parcel should have been gone; and *Cooke* had so far parted with the possession, and all controul over it, as that, aided by the existing engagement between them, it would have been a fraud in *Cooke* to have dealt with it afterwards as his own

own property. The servant with whom it had been left, was a mere passive depository till the postman should call for it; and she may have given it to the sheriff's officer by mistake, taking him for the postman. Then even if *Cooke* had any controul over the parcel, the sheriff, who was a stranger, could have none, nor had he any right to defeat the inchoate delivery of the parcel to the postman, nor could he oblige *Cooke* to countermand its original destination. It could not be said, that if the servant had been in the act of delivering the parcel to the postman, that the sheriff could have snatched it out of her hands. She was a trustee for *Lambton* and Co. and they could have maintained trover for the parcel, though *Cooke* could not. If it had been lost, *Lambton* and Co. must have been the losers, as much as if they had purchased the contents, and paid the consideration money. On each point therefore, he submitted, there ought to be judgment for the defendant.

*Nolan*, about to reply, was stopped by

**RICHARDS, Lord Chief Baron.** If the subject-matter, which has been taken under this extent, had been of a different nature, it is admitted that the seizure would have been right. On the 2d of *July*; no appropriation of the contents of the parcel had been made, and if it be a general rule which must prevail, that the inquisition having put the debt on record, binds the property of the debtor,

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debtor, these papers were as much bound by it as his chairs and tables. On the 3d this parcel was made up, and delivered in the evening to *Cooke's* woman-servant by his clerks, who is to keep it in safe custody, and in trust for *Cooke*, till the next morning, when she has orders to deliver it to the postman. When delivered to him, it would have been a delivery to *Lambton*; but, in the mean time, it is delivered to no one, and is entirely subject to the controul of *Cooke*, as much as if he had put it into his desk. The crown is placed by the seizure in the same situation as *Cooke*. There can be no question, therefore, but this demurrer is right.

GRAHAM, *Baron*. There have been three questions made on this demurrer. The first, as to the form of the plea, I put out of my consideration, for there is no doubt but that the traverse is consistent with the defendants case. The next question is one which, if we decide it in favor of the demurrer, at once puts an end to the other; and on that my opinion is against the defendant, for the extent against *Bruce* is tested the 2d of *July*, and an inquisition is taken thereon on the same day, which having been returned, finding *Cooke's* debt to *Bruce*, at once assigns it to the crown, and from that moment it is seizable, although another process is necessary to make it available. Then the extent of the 4th of *November*, in the same year, attaches on the goods found by the inquisition of the 2d of *July*.

I was

I was certainly much struck by the argument founded on the bills of exchange, and the distinction taken between goods and chattels, and *choses in action*, and I would wish, since it is not necessary in the present case, to avoid giving any decisive opinion on that point, but I cannot help saying, that if *Cooke*, not being cognisant of the extent, had, before actual seizure, endorsed the bills *bonâ fide*, I should have great difficulty in holding that the indorsees would not be entitled to recover on them, or that the acceptors would not be bound to pay them. But with every inclination in favour of the defendants on that point, I cannot say that there was in this case any delivery of the parcel to *Lambton* and Co. and without a delivery an indorsement is of no avail. The parcel, when seized by the sheriff, had never been out of the custody of *Cooke*, and he might have changed the contents for any other notes, or if any exigency had required that he should revoke its destination, he might have done it. The agreement between the banking-houses was of a specific nature, but it contains nothing to bind the parties to settle their balances in the particular way in which they were accustomed to do so, by this transfer of bills of exchange. In case of any accident happening to this parcel, *Cooke* must have borne the loss, until it had been delivered to the postman. Had the woman mistaken the officer for the postman, there might have been a shade of difference in the case, but she knew his person, and the officer seized the parcel

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parcel out of her hands, and had he robbed her of it, it would have been at *Cooke's* risk.

I am therefore clearly of opinion, that there was no delivery to *Lambton* and Co. and that there must be judgment for the crown.

Wood, Baron. It is necessary to consider, in this case, at what precise time the crown's right attached; for without doubt, if the debtor had this parcel in his custody at the time of the seizure, the crown had a right to seize it. The custody of *Cooke's* servant was the custody of *Cooke*, and therefore I think it was liable to be seized under this extent in her hands.

As to the argument of the bills having been specially endorsed, it is clear that a special indorsement does not transfer the property in bills until they are delivered over; and that must be averred in the declaration. The form of pleading is, that the party endorsed, and then and there delivered, &c.

I remember a case in the books, where, on a motion in arrest of judgment, the court said that it was necessary that the plaintiff should prove a delivery.

Whether it would have been a good delivery in the hands of the postman, or not, is another question.

question, but in this case it never was given to the postman, or was out of the custody of *Cooke*, till it got into the hands of the sheriff.

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and others.

It was said, that no one but *Cooke* had the power to deliver the parcel, but if *Cooke* had that power, then certainly the crown had a right to seize it. There is an old case to be found*, where a person had made over his estate to another, reserving to himself a power of revocation, and that estate was held to be seizable. Whatever power of revocation *Cooke* had as to this parcel, belonged on the seizure to the crown.

GARROW, *Baron*, of the same opinion, and for the same reasons. This has been compared to a purchase of the bills; but it is nothing like it, for *Cooke* might have altered their destination, and withdrawn the notes and bills, and substituted better or worse paper, and in short have done what he pleased with the parcel up to the moment of its seizure. If the postman had not come as was expected, would not the period of his controul have been extended? Or if *Lambton* and Co. had refused to take the bills enclosed, would they have been bound by the fact of their having been put up into this parcel? If a burglary had been committed in the banking-house, the loss would have been *Cooke's* and not *Lambton's*. While they were in the hands of *Cooke*, they were

* Probably *The King v. The Earl of Nottingham*, Lane's Rep. 47.

not

to make an affidavit of the contents, it ought not to be received.

It was, in fact, made by one who described himself to be an insurance-broker, and agent to the plaintiffs, and he swore that 'he had investigated the circumstances attending the loss demanded upon the said policy, and that, in his judgment, the said plaintiffs had several material witnesses to examine, residing at *Lisbon*, in the kingdom of *Portugal*, as deponent had been informed and believed, and particularly, &c.' (naming certain persons at *Lisbon*.) And he further swore, that the plaintiffs would not be able to make a good defence to the action without the testimony of such witnesses, and that the injunction sought by the said plaintiffs, to restrain the defendants from proceeding in the action, was not for delay, but for the purpose of trying the action on the merits.

It was submitted, that an affidavit in support of such a motion, (which always caused great delay,) ought to be made by the party himself, or his solicitor*, and that the statements in the present were not such, or so satisfactory, as the Court is in the habit of requiring, on motions for a com-

* See the case of *Laragoty v. The Attorney General*, (ante, vol. ii. p. 172,) where an affidavit made by the attorney concerned for the party was held sufficient, where it stated that his belief of the facts sworn to was founded on documentary evidence in his possession,—but that otherwise bare information and belief would not have been sufficient.

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mission to examine witnesses abroad, which were by no means of course, but were granted only on properly authenticated facts, shewing that the justice of the case could not be otherwise attained.

RICHARDS, Chief Baron. Most clearly a proper affidavit, made by the insurance-broker of the party, cannot be sufficient to obtain a commission; and as clearly, such an affidavit as this, if made by a proper deponent, would even then be insufficient. The party himself, or at least his attorney, should make the affidavit in support of this sort of motion, in all cases.

Per Curiam.

Motion refused.

The

The KING, in aid of THE KENT INSURANCE COMPANY, v. RAMSBOTTOM and others, Assignees of PENFOLD and others.

1818.

Saturday,
7th February.

THIS was a motion in arrest of judgment, on certain technical objections taken to the pleadings. A verdict had been found for the crown on the trial of this proceeding, which was an extent in aid of a certain association of private individuals calling themselves *The Kent Insurance Company*.

Where an extent had issued in aid of a company of individuals, (not incorporated,) and the inquisition found that their debtor 'was indebted to L. and H.'—(two of the company who had executed the usual bond to the Crown as taken from joint insurance companies under the 23 Geo. III. ch. 48. on behalf of themselves and the company)—'and the other partners and proprietors of a certain Society, called, &c.—held sufficient on motion in

The record set out the writ of extent against the *Penfolds*, which recited, that *Larking* and *Hougham*, by their certain joint and several bond*, became bound to the Crown in 3000*l.* payable

* That bond was given by them to the Crown, as directed by the Stamp Act, (22 Geo. III. ch. 48.) in the name of themselves and the company, with the usual condition to make due returns.

arrest of judgment: and that it was not a fatal objection not to have named all the members of the company, in the finding of the debt by the inquisition.

Nor is a finding, that two persons were indebted to L. and H. and the other partners and proprietors of the unincorporated company, at variance with a command to the sheriff, to find what debts are due to L. and H. on behalf of themselves, and a certain Society, called &c.

A recital in a writ of extent, that two persons are indebted to the Crown by bond, (generally,) is sufficient to authorize a command to the sheriff to enquire of debts due to such two persons, on behalf of themselves, and a certain Society, called &c.

Where the Crown debtor has debts due to him jointly with others who are not debtors to the Crown, and would therefore not be entitled to the Crown process, an extent may issue for such joint debts.

Matters of fact not appearing on the record, cannot be called in aid, in opposition to a motion in arrest of judgment, on objections apparent on the face of the record.

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 and others.

able at a day past, which was not paid; and that by an inquisition, by virtue of a prior writ of extent against them, commanding the sheriff 'to enquire what debts &c. were due to them the said *Larking and Hougham*, for and *on behalf of themselves, and a certain Society, called "The Kent Insurance Company,"* or any other person or persons to their or either of their use, or *in trust for them* or either of them, then had in' &c. it was found &c. 'that *Edward Penfold, and William Margesson Penfold, of Maidstone, bankers,* on the day of taking the inquisition, were justly and truly indebted to *John Larking and William Hougham*, in the said writ named, *and the other partners and proprietors of a certain Society or Company, called "The Kent Insurance Company,"* in the sum of 2829*l. 15s. 6d.* for money had and received by them (the *Penfolds*) as such bankers as aforesaid, to and for the use of the said Society or Company, which said debt the sheriff had seized' &c.—and commanded the sheriff of the county of *Kent* to enquire what lands and tenements, and of what yearly values, the said *Edward Penfold* and *William M. Penfold* or either of them, had in his bailwick, and what goods and chattels &c. and the same diligently to appraise and extend &c. &c.

The sheriff returned, that he had seized &c. and that the assignees of the *Penfolds*, who had since become bankrupts, had deposited the said debt in his hands, and had given him notice not to pay it over, as they intended to move the Court &c.—praying directions. The defendants
 (the

(the *Penfolds*' assignees) appeared, (14th June,) and claimed the money deposited &c.—and pleaded the bankruptcy of the *Penfolds*—traversed the finding of the inquisition, as to the debt due from them to *Larking* and *Hougham*, and the other partners and proprietors of The *Kent Insurance Company*—and prayed judgment, and *amoveas manus*.—Replication taking issue.

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Parke, on those pleadings, obtained a rule, calling on the prosecutors of the extent to shew cause why the verdict should not be set aside, and a new trial had, or why the judgment should not be arrested*, and a writ of *amoveas manus* issued on the following objections:—

1st. That the writ of extent against *Larking* and *Hougham* was insufficient to warrant the finding of the debt found by the jury, because it was a debt due to other persons than those recited to be indebted to the crown on the bond: and because it appeared on the face of the record, by the the mandatory part of the writ, as set out, and the recital of the debt found by the inquisition, that the sheriff and jury had not pursued the directions of the process; and therefore as their finding under the inquisition did not correspond with the recital of the original debt and the command to the sheriff, that finding was not authorised by the writ of extent.

* The Court, on that occasion, refused the former part of the application; and therefore the motion was now confined to the arrest of judgment.

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2dly. That, if (on the contrary) the finding were authorised, then the debt found to be due to *Larking and Haugham* was not well found, because the NAMES and other sufficient designation of the persons to whom the debt was found to be due were not STATED, and therefore the inquisition was void, for uncertainty.

On the first point, it was observed, that the bond was stated to be entered into by *Larking and Haugham only*, whereas the command was to find what debts &c. were due to them, *on behalf of themselves, and The Kent Insurance Company*, and upon that the inquisition found that *Pensfold and Co.* were indebted to *Larking and Haugham* in the said writ named, and the other partners and proprietors of The Kent Insurance Company. Thus there was an obvious discrepancy and inconsistency in terms, in three distinct parts of this proceeding, apparent on the record, and therefore, (he contended) that according to the rules of pleading, from which this sort of proceeding was not exempt, the judgment, which was founded on it, could not stand.

He next submitted, that (if the variance pointed out were not fatal,) as the sheriff having exceeded his authority in taking an inquisition not commanded by the writ, that was also a ground for arresting the judgment; and he cited *Viner's Abr. Tit. Office, C.* and the case of *Pretton v. Furbeck (a)* on that point.

As to the other objection, he insisted that (the company not being a corporate body, but a partnership of individuals: not bound together for any given period of time, and who were a fluctuating body, liable to a daily change of members,) each individual ought to be named in all proceedings in which those persons were collectively concerned, for that otherwise a judgment, satisfied on a verdict recovered by two of them, in the name of the company, against their debtor, for the debt due from him, could not be effectually pleaded in bar to a future action, to be brought by any others, or the whole of the company, for the same demand—that the party defendant could not otherwise know whom, or for what he was called on to answer, and that he might also, in many instances, be deprived of the plea of set off, or tender: and such a general uncertainty would pervade the demand, as the law did not permit. On the point of insufficiency for uncertainty, he cited the following authorities:—*The King v. Harrison* (b), (where Lord Kenyon held that a conviction of such a one *and company* could not be supported;)—*Spalding v. Mure* (c), (where it was held, that on a declaration for money had and received by three defendants, to the use of the plaintiffs, they could not give in evidence money so had and received to their use by the three, and a fourth person, who was dead;) *Rex v. Patrick and Pepper* (d); — *The King*

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(b) 8 T. R. 508.

(c) 6 T. R. 635.

(d) 1 Leach, Cro. Law,
287, 3d ed.v. *Sherington*

FROM
THE FIRST
OF
HARRISON'S
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v. Sherington (c); which last was a case of an indictment for stealing articles belonging to the trustees of the poor of the *Old Artillery-ground*; and there, notwithstanding there existed an act of parliament vesting the property in the appointed trustees and their successors, and in empowering them to prefer bills of indictment for larceny, it was held that the trustees not being incorporated, ought to have been named, and that the indictment should have laid the articles to have been the property of *Ad Bayard & Co. trustees &c.* and *Rushton v. Haygate (f)* (where it was found by inquisition on an extent against *Rushton*, at the suit of the queen, that *Rushton* was possessed of a term *quorundam annorum in dubio venturorum*, which being excepted to, was held bad for the uncertainty.) And the reason given in the cause, as the subject might come in again; and claim his property, when the crown's debt was satisfied, there ought therefore to be a sufficient certainty, to enable him to do so. In *Widdall v. Errington (g)*, where judgment was arrested, because the declaration (in trespass for entering a house, and taking *bona et catalla ibidem inventa*) did not specify what the goods were; so that that recovery could not have been pleaded in case of another action brought for the same goods. And to the same point he also mentioned the cases of *one Thompson v. one of the heirs of one of the*

2028 bus 2572. 11097 1 (A)

1011 2 3 11 3 (A)

1011 2 3 11 3 (A)

2 lb. 121.

(g) 2 Ld. Raym. 1410.

1011 2 3 11 3 (A)

1011 m 24 J Bextie

Bertie v. Pickering (h); *Copleston v. Ripon* (i);
Hovel v. Reynolds (k); and *Cook v. Cox* (l).
Dunreay, Richardson, and Marsham, now
showed cause. They contended, first, that there
was in effect no real discrepancy between the
terms of the writ and the finding of the inquisi-
tion, even if the more nice grammatical distinc-
tion, attempted to be made, should be acknow-
ledged; for that although the writ recited that
the inquisition was by virtue of an extent against
Larking and Hougham, and the direction was to
find debts due to them, on behalf of themselves
and a certain Society &c. and that it was found
that the *Penfolds* were indebted to '*Larking and
Hougham, in the said writ named, and the other
partners and proprietors of a certain Society
&c.*' yet there was enough stated on the record
to connect them fairly and intelligibly together;
and fully, that the directory clause of the writ, and
the finding of the inquisition, substantially and to
a reasonable intent corresponded in terms; or that
at all events the directory part of the writ of ex-
tent against the *Penfolds* was in correspondence
with the finding of the inquisition thereon; and
they submitted that the other preceding recitals
might, if inconsistent, be rejected as surplusage;
for that they were not necessary to the authority
given to the sheriff, or to the subsequent pro-
ceedings—*but as to the recital that Larking and*

121. d1 2

387c

(h) 1 Bur. 2455.
 (i) 1 Ld. Raym. 191.

(k) 1 Ventr. 272, and 329,
 (l) 3 M. & S. 110.

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Houghton were indebted on bond to the crown, and its stopping there, without adding (as the condition was) "on behalf of themselves and the company," that could not be urged as an objection, because the nature of the bond which is referred to by the record, and was ready to be produced, would sufficiently shew that they were indebted to the crown on that bond, in the character of persons acting for and on the behalf of the *Kent Insurance Company*, given them by the act of 22 Geo. III. ch. 48. (the stamp act) which recognizes and authorizes their so acting. And therefore they submitted that the usual omission of the condition of the bond on the record (as was the practice), did not create such a discrepancy as would be fatal to the proceedings. They also submitted, that if that were not so, the objection was now made too late—after judgment—and ought to have been taken earlier, and before the cause was tried, and not now, in the shape of a motion to set aside the proceedings for irregularity, when they had taken the chance of a verdict.

As to the second and principal objection, That the pains of all the parties forming the *Kent Insurance Company* ought to have appeared on the record—they contended (admitting that it was not an incorporated society), that that was not necessary, for that the society was recognized by act of parliament—the 22 Geo. III. ch. 48.—which not only notices the existence of such societies, but provides a power to enable them

them to act through the medium of two of their members, whom it authorizes to give the bond now in question, anticipating and obviating by that provision, in the dealings of such companies with government, the inconveniences now made matter of objection on the part of these individuals. They also submitted, that an answer might be given, in reason (at least if not in law, to the objection, both in the absolute inability (as it concerned the defendant) of putting all the names on the record, and the impracticability and inconvenience of it as it affected the plaintiffs. And to shew that the latter principle was recognized and acted on by the Courts, they cited the case of *Cockburn v. Thompson* (m),—(to which the Lord Chief Baron added the case of *Adair v. The New River Company* (n), and said, that there were also cases relating to the getting in of prize-money, which proceeded on similar grounds)—where the Chancellor had dispensed with the names even of persons who would, under other circumstances, have been necessary parties, on the sole ground of the incapability to furnish them, in consequence of their number and inaccessibility. As to the cases cited on that point, they denied the applicability of decisions in criminal and penal cases to questions arising on proceedings where the Crown sues to recover its debts.

They then submitted, that payment under this

(m) 16 Ves. 321.

(n) 11 Ves. 444. There impracticability made certain cases exceptions to the general rule.

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extent would be a legal bar to any suit instituted by the company, or any of them, to recover the same debt, or if the statement of any facts the want of which was now complained of, ought, for that purpose, to have been put on the record, it was for the defendants to have procured that statement, by pleading so as to have produced it. And they urged that this objection also was now made too late.

Parke, in support of the rule, premised that the Court could not take notice of any thing not on the record, in disposing of the present objections, in order that the grounds of its determination might be obvious in case of error brought, and that therefore the bond could not now be considered; in discussing these questions, as it was not set out, and (although adverted to) had not been averred to have been given in pursuance of the act of parliament and he insisted that these objections being on the face of the record, the defendants were not bound to apply to the Court for the purpose of taking advantage of them earlier than before judgment.

He then resumed the arguments used on making the original motion, insisting that the sheriff was not warranted by this writ, in directing an inquiry as to any debts but such as should be due to *Larking* and *Hougham* alone, or to other persons in trust for them.

[*GRAHAM, Baron*, suggested, that by the practice

tice in cases of extent, the Crown might have seized the debts due to *Larking and Hougham and the company*, for the Crown debt of *Larking and Hougham*.]

On the objection of the partners of the company not having been named, on which he principally relied, he observed, that no authority had been cited, nor any effectual argument used against it; for the cases cited from the decisions of a court of equity, where the practice and the rules were subjected to the equitable circumstances of each particular case, (he maintained) were not applicable, as authorities on questions of *pleading* in courts of *law*: and besides, it did not appear on *this record* that the company consisted of, as great a number of persons, or of any persons except *Larking and Hougham*: and therefore, in point of fact even the equitable exception to the rule of pleading was not applicable here, where it would not have been a difficult matter for the Crown to have ascertained the names of the company in the present instance. If they should have been composed of only four or five individuals, they ought to be named, and perhaps would be, and their number, however large, cannot obviate the rules of pleading.

A defendant in every suit is entitled to a record of such a degree of certainty, and particularity as may enable him to use it in pleading to another action for the same subject-matter, and this is clearly not such a record, because the defendants are not furnished by it with the means

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of identifying *Larking* and *Hougham* with the rest of their creditors, calling themselves this company, and he reverted to the cases before cited on that point. He contended, in short, mainly, that the present allegation on this record, on which issue had been taken, was not more certain than if it had been found that the *Penfolds* were indebted to *Larking* and *Haugham*, and others; — and that it could not admit of a doubt, that such a finding or averment in any proceeding, whether a declaration or an inquisition, would be an answerable ground for a motion in arrest of judgment. An inquisition ought to be at least as certain as a declaration or a judgment, and if so, it is no answer to an objection of want of such certainty, that the Crown is entitled to the debt if properly found. He submitted, therefore, that this judgment ought to be reversed.

Dauncey, in reply, said, that a similar objection to the last now made, had been taken to the proceedings of the Crown against the *Reading Bank*, consisting of a firm of five, two of whom only were Crown debtors, and the question was raised whether the firm could use the crown process, two only of them being Crown debtors, when the Court held, that they might: and he submitted that, this was very much the same case.

He then observed, that so far from this debt having been found with any thing like uncertainty, the nature of it was described with particular minuteness, in being stated to be a debt due

to

to *Larking and Hougham*, on behalf of themselves and a certain society called the *Kent Insurance Company*—and if not, still the concluding words of the directing part of the writ would take it out of this objection, if it were otherwise well founded, for this debt was due to all the company collectively *in trust*, for each individual as to his particular share. And he ended by insisting, that the want of information and knowledge of the persons composing the company, which was now made matter of objection, was in effect waived by the defendants having pleaded to the inquisition that they (the defendants) were not indebted to them, the individuals named and the other partners and proprietors of the *Kent Insurance Company*.

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RICHARDS, Chief Baron—(stopping further reply)—We are of opinion that this rule ought to be discharged. It has been stated as an objection, and very ably urged, that there is a discrepancy even in the two parts of the writ itself. I, however, confess, that as far as I understand it, I see no such discrepancy. It is stated, there is a debt due from these persons to the Crown. That is sufficient to found the process. Then the mandatory part of it directs the debts due to them to be inquired into. [His Lordship then read the questionable passages of the record.]

As to the alleged variance between the finding of the inquisition, and the authority given to seize the debt due from the bankrupts to this company,

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company, I cannot understand the drift of the distinction which has been attempted to be made, although I certainly see a trifling difference in the words used, but I do not feel the force of the ingenious arguments which have certainly been pressed upon us with great ability, to induce us to arrest this judgment.

Then with respect to the other objection, that the whole of the persons forming the company are not named, it would be a mischievous rule—if it could operate in the present case to arrest the judgment which has been entered upon this verdict after issue joined—that would oblige us to hold for a moment that these proceedings do not warrant that judgment. I should apprehend that it would be impossible for the defendants to have a better defence against the insurance company, if they should bring another action for this debt, than this verdict supported by the judgment, and therefore I am of opinion that this rule ought to be discharged.

GRAHAM, Baron. I am of the same opinion. It strikes me that there is no defect in this record as it stands. As to the first objection (stating it) it would certainly have been more accurate to have stated that the bond was not given by them alone, but on behalf of the company of which they were members and trustees; but still that which is stated upon this record was sufficient to authorize the issuing of the process. No doubt the framers of the writ was apprised of the condition of

of the bond itself, for the mandatory part of it is accommodated to the circumstances of this case, [Having read the command to the sheriff, and the finding of the debt as by the inquisition, which his Lordship said, he considered not discrepant in effect, or that if it were so in words, the direction being extended to the finding *trust debts*, the debt from the *Penfolds* to the company was a debt to them, in trust for *Larking* and *Hougham*, as well as the other members of the company, which would be sufficient to cover the defect, and that, in point of fact, a debt due to persons on behalf of themselves and others, constituted a debt due to them, as did also a debt due to them and others.]. So that I think (continued his Lordship) that there was a fair ground recited to authorize the court to issue the process upon the bond to the two, and that the mandatory part of the writ is effectually complied with by the finding in the inquisition. Therefore that inquisition, in my opinion, authorizes the proceedings subsequently had under this writ of extent.

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Then the main objection, and which seemed principally to be relied upon (and as to which there might perhaps, exist in some minds a certain degree of doubt) is, that there is no return made of the names of the several persons who constituted the *Kent Insurance Company* when the writ bore *teste*. Now that objection is answered by stating the course of this Court to be, after when the sheriff has returned that he finds that *A* and *B* are indebted to the crown, an amicable writ in the

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first instance issues, which has always been deemed sufficient to found an inquiry as to what debts are due to them, and it is of no consequence if in the debts found they should be connected with persons whose names may be as numerous as the letters of the alphabet, if the debts be in fact due to the Crown debtor.

They are amenable, and that gives the Crown a right to the whole 5000*l.* or whatever sum may be due to this company, and it is sufficient that *A.* and *B.* are two of the persons to whom this debt is owing; and therefore there is no injustice done. If we were to say that the sheriff upon every inquisition is bound to inquire what are the different interests of every partner, ostensible and dormant, and who are the different persons who constitute each separate firm, we should throw insurmountable difficulties in the way of recovering the Crown's debts. It is open to the parties who may be aggrieved to apply specially to this Court under such circumstances, and the inquisition does not preclude them from coming forward to contest this writ, and the Court would always direct the proper inquiries, and do what was just in such a case; but it would be too much to say, that a defendant may lie by, and then come forward to move such objections as these in arrest of judgment, when he had had all along full means of ascertaining who were the persons interested in the debt.

Another argument is pressed upon us—that the writ not expressing the names of these persons,

sons, it wants necessary certainty, and the defendants might thereby be put to very serious difficulty in defending themselves in any future action for this debt. But I think it would not be difficult to obviate that by proper averments in the plea. That part of the case one of my learned brothers will give a better answer to, perhaps than I can. Common sense however, tells us, that they would have an obvious defence, if the company were advised to bring an action hereafter against the *Penfolds*; for it would be an easy thing to state in answer to it the facts appearing on this record.

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Then it was said, that you are to look with the same strictness to an inquisition as to a declaration. I own if a declaration had been framed without specifying all the names of the parties, that would be a difficulty, for as the law now stands, they must state the names of all the persons interested in the action; but it is different in cases of this kind, for it has always been the rule of this Court to afford facilities in cases of suits instituted for the recovery of debts due to the Crown, beyond what might be allowed in the case of private individuals*. On these grounds, I am of opinion that the objections taken will not stand the test of examination, and must therefore be over-ruled.

Wood, *Baron*. I agree, that in determining

* The extent itself is an instance of that principle.

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these objections we can only look to the record. We can draw no inference of our own knowledge from any other source. The question now is, whether there is enough upon this record to warrant this judgment for the Crown. Several objections have been taken to it—that the writ is bad because the mandatory part is not warranted by the reciting part—that the finding of the debt by the inquisition does not correspond with the command in the writ itself—and that all the partners in this insurance company ought to have been named and described on the record—and to these has been added another, that the debt itself which has been seized into the hands of the Crown, is not described with sufficient certainty upon this record.

The writ of extent certainly begins by reciting that these two persons, *Larking* and *Hougham*, are indebted by bond to the Crown. It does not state the condition of the bond, but merely that a bond was given *by them* to the Crown. There is however a debt stated, therefore, clearly warranting the inquisition. Now the law upon that is this, where two persons are found to be indebted to the Crown, a writ may be issued to require of and authorize the sheriff to seize debts due to them, and also to others. That was so settled in the *Reading* case. Then there being here sufficient authority for the sheriff to seize any debt due to these two persons: the mandatory part of the writ is, &c. (stating it, page 448.), the import of which is that he is to find debts due to these persons,

sons, *Larking and Hougham*, jointly with the rest of their partners, constituting the *Kent Insurance Company*,—that, clearly must be the meaning of it,—for and on behalf of themselves, (as constituting a part of that company,) and of the rest of the company, and it comes precisely to the same thing as if it had run in the terms of the inquisition, to find debts due to them, (that is, *Larking and Hougham*), and the other proprietors of the company. Then that being the sense of the writ, the inquisition pursues it in substance, though not in words, so that there is no substantial variance between them, and the inquisition is warranted by the sense of the writ.

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The last objection is, whether this debt is sufficiently described in the inquisition. It is in fact thus described, that the bankrupts were indebted to *Larking and Hougham*, and the other partners and proprietors of the company called the *Kent Insurance Company*. Now, I think that is a sufficient description of the debt which has been seized into the hands of the Crown; because, according to the cases, all that is necessary is that it should be found with convenient certainty, that the party may be able to defend himself against any other persons who might afterwards be disposed to bring an action on the same account. That is the rule by which we ought to be governed. That has been done in this case; for the defendant might make a defence from this inquisition against any future action, by

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stating the facts on this record, adding only proper averments of identity, as that the plaintiffs are the same persons as are described by the name of the *Kent Insurance Company*, and that the debt is the same which is required in every action. Nothing more than that would be necessary to constitute a good defence to any action that could be brought hereafter by this company for the same debt.

GATKOW, *Baron*. This is an application after trial to arrest the judgment, and in the opinion I have formed upon this subject, I have followed my brother *Graham*. I think we ought not to go out of the four corners of the record, and upon that ground I am of opinion that this rule must be discharged. It was admitted in the progress of the argument, which has been conducted with great ability on the part of the defendant, that almost every thing necessary to sustain the judgment is stated on the record, and it is admitted, that if these two persons, *Larking* and *Hougham*, were not connected with the company, but stood alone, and if in their individual characters they had been debtors to the Crown, the mandatory part of the writ would have been warranted—and that the jury would have been justified in finding this debt to be due to them, whether as connected with a banking or insurance company, or any other concern. The command is to find whether the *Penfolds* are indebted to the *Kent Insurance Company*, and the
inquisition

inquisition in effect finds they are indebted to *Larking and Hougham*, and other parties, partners, to the jury unknown, and that has been so returned.

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Then the only important question is, whether the *Penfolds*, after having satisfied this debt due to the *Kent Insurance Company*, will be furnished by this record with a good defence against any claim that might be made by the company hereafter. I will not weaken that which has been so ably stated by my learned brother *Wood*, by adding any observations of my own. I however conceive that any thing which is left uncertain may be made certain by supplying the deficiencies by means of such averments as have been alluded to.

Therefore I am clearly of opinion with the rest of my learned brothers, that this rule ought to be discharged.

Per Curiam.

Rule discharged.

1818.

Monday,
9th February,

Application to suspend an order of the Court till an appeal, of which notice had been given, should be determined, would be more properly made to the court of appeal, particularly where that court has already interfered in the cause; but the Court will suspend their order for a given period, and to a certain extent, on motion, for the purpose of giving the party an opportunity of applying to the appellate court.

If a plaintiff do not file his answer to interrogatories, the course is to make an order on him to shew cause why they should not be taken *pro confesso*.

Sir WATKIN LEWES v. MORGAN.

NOTICE having been given by the defendant, that he intended to present to the House of Lords a petition of appeal against the several orders, made by this Court in the month of November last,

Dauncey and Raithby now moved, pursuant to notice, that all proceedings in this cause, founded on those orders, might be stayed until after the appeal should be heard.

The *Solicitor General* and *Blake* opposed it, and principally on the ground, that the application should have been made to the House of Lords, citing the case of *Huguenin v. Baseley* (a).

GRAHAM, *Baron*, I have considerable doubt about the propriety of the present application to us, for I accede entirely to the opinion expressed by the Lord Chancellor in *Huguenin v. Baseley*, that it is, at least, much more expedient that such an application should be made to the House of Lords, and for the unanswerable reason given by his Lordship, that such applications, if encouraged, would paralyze the arm of justice. In subsequent cases too, the House of Lords has been declared to

be the proper court to which to apply on similar occasions (*b*), and that an appeal lodged does not, *ipso facto*, stay the proceedings. In the present case too, the court of appellate jurisdiction is more especially the proper tribunal to which such an application should be addressed, because the House of Lords have, in fact, framed this case throughout.

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As it now appears, however, that *Wilder's* mortgage was not quite paid off, our orders may have gone somewhat too far; not that I mean to express the least doubt about the propriety of it; on the principle on which such of the Court as made the orders proceeded; but under the circumstances which now present themselves to us, I think we should suspend the order till the 20th of *April*, but in the mean time the orders, as far as they operate to restrain the defendant in any respect, must be considered as in force, and must be obeyed.

Wood, Baron. This Court has, most undoubtedly, authority to suspend its own proceedings at any time, and the practice of appeals proves it; for if it were bound by its orders, the right of appeal would, in many instances, be altogether taken away—writs of error from courts of law are writs of right; and when they have been

(*b*) *Waldo v. Caley*, 18 Ves. 200.—*Willan v. Willan*, 1b. 216.

sued

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 Sir WATKIN
 Lewis
 v.
 Moseley.

sued out, and bail put in, they suspend the proceedings *ipso facto, et ex debito justitiæ*. It used to be the same in appeals from courts of equity, until the general order of the House of Lords was made, for the purpose of altering (c) the practice in that respect, in 1807. But notwithstanding that order, the Court of Chancery has held that the proceedings may be stayed on special application for that purpose, and that such an application may be made to either the court below, or to the court of appeal; although the Chancellor observes, in the case of *Huguenin v. Baseley*, that it is more expedient that the application should be made to the House of Lords, if it can.

I shall not enter into the merits of the orders now, further than to say, that there are reasonable grounds of doubt, and that is all that is necessary to warrant the present application. I myself thought that the order ought not to have been made, and as I am satisfied that there will be found to be due to the defendant a very considerable balance on the coming in of the general account, I think that that is a sufficient reason we should suspend the orders.

GARROW, *Baron*, [after having made some observations, justifying the orders, admitting, however, the possibility that they might be rescinded,]

(c) Vide 15 Ves. 184.

expressed

expressed his reluctant concurrence with the decision for suspending the orders till the time mentioned, and enlarging the time for paying the money into Court, in the expectation that the defendant would, in the interim, use his diligence in bringing them before the House of Lords, and with the understanding, that the defendant was to be still restrained from receiving the rents and profits,

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Ordered, that the time for paying the money into Court, under the orders of 18th and 27th November, be enlarged till the 20th of April, and that the proceedings under the said orders, as to delivering up possession, be stayed till further order.

By an order made in this cause, on Thursday, the 25th day of June last, it was ordered that the plaintiff should, on Saturday then next, shew cause why the state of facts brought into the office of the Deputy Remembrancer of this Court, (to whom this cause stands referred,) by the said defendant *John Morgan*, should not be taken as confessed by the plaintiff: which said day of shewing cause was, on the 27th day of the same June,

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13th November.

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June, enlarged until this day. Now (upon hearing on both sides,) IT IS ORDERED by the Court, that in case the plaintiff shall make default in filing his answers to certain interrogatories, exhibited by the said defendant before the said Deputy Remembrancer for his examination, by the 1st day of next *Hilary* Term, the said defendant, *John Morgan*, is then to be at liberty to make an affidavit of the several facts to which the said interrogatories so exhibited by him, for the said plaintiff's examination, are intended to apply; which affidavit the said Deputy Remembrancer is then to take into his consideration, and proceed in the accounts and enquiries now before him, under the decree in this cause.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, L^{ORD} CH. BARON.

The MAYOR, &c. of the Borough of *Reading*, and
their Lessee, v. WINKWORTH and others.

1818.

Tuesday,
10th February.

THE Corporation of *Reading* filed the present bill (1815) against the defendants,—praying that they might be declared to be entitled, by immemorial usage and custom, to have and receive the tolls thereinbefore mentioned, for or in respect of all corn or grain sold in the said borough, either in the market-place there, or elsewhere in such borough, or on the market-day there, or on any other days, and either by sample or in bulk: and to have such toll paid to them by the sellers of such corn or grain:—and that an account might be decreed to be taken of the several quantities and species of corn or grain sold in the said borough, since the beginning of the year 1811, by or for, or on account of the defendants respectively: and of the quantities and values of so much of such corn or grain, as ought to have been rendered or delivered to plaintiffs, or their lessee, for or in respect of the said toll; and that the full value of such toll might be decreed to be paid to plaintiffs by said defendants, their said lessee

Bill for the value of tolls charged to be subtracted by the defendant, and claimed to be due for corn sold by sample in their market, and for an account, and a declaration of their title:—*retained with liberty to bring actions &c. although the plaintiffs had not previously established their right at law.*

The question itself is a question purely legal, and must be decided at law before a court of equity can make an effectual decree; but the plaintiffs having succeeded at law, the Court will entertain a bill for an account &c.

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&c.
WINKWORTH
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lessee consenting to such payments being made to plaintiffs.

The bill set forth the plaintiffs' title, as deduced from the Abbot of the monastery of *Reading*—that their possessions on the dissolution had become vested in the Crown, amongst which was a privilege to take as toll one quart of every quarter of wheat, rye, barley, oats, malt, and other kind of corn or grain, brought into the *Reading* market to be sold &c. and a proportional part &c.—that that privilege Queen *Elizabeth* had by letters patent, granted to the plaintiffs, in consideration of their keeping the bridges and market-place of the borough, and streets leading thereto, in repair—paying to the Crown a fee-farm rent of 22*l.*—and finding a schoolmaster, for ever, to teach grammar within the borough.

The bill then charged, that the defendants had sold divers quantities of corn and grain, brought to the market for sale, either in sample or in bulk, and which had been afterwards delivered to the buyers thereof, without rendering the accustomed toll.

The defendants, by their answer, stated, that they were (mostly) corn-dealers and farmers—that some of them resided within, and some without the borough—admitted their having sold corn and grain in the said market-place, but averred that all such corn had been sold by sample, and not in bulk, each of such samples being a sack of corn

or

or grain, pitched and exhibited in the market-place on a market-day—and that in other parts of the said borough than the market-place, they had sold corn both by sample and in bulk, all which had been afterwards delivered to the buyer. And they submitted, that the plaintiffs were only entitled to take toll on the corn contained in the sample sacks so pitched in the market-place, and that they were not entitled to any toll, either from buyers or sellers, on any corn sold elsewhere in the borough than the market-place.

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Jervis, Agar, and Parker, for the defendants, objected *in limine*, that the plaintiffs had no equity on which the Court could entertain such a suit; that if there had been any substraction of toll legally due, the plaintiffs' remedy was at law:—and that they had no right to resort to a court of equity in the first instance, until their claim had been established before a jury. And in support of that objection they cited the following cases from *Bunbury*—*Disney v. Robertson* and another (a), where a bill, filed for tolls for landing of goods, was dismissed *per totam Curiam*, as being a matter proper at law, and as a bill could be of no use, for it could not preclude any body but the defendants, and that because it was not, like a bill of peace, binding on all parties.—*The Attorney General v. Dyre* (b), which was the case of a bill filed for the purpose of establishing a right to tolls in a manor, where the Court intimated an

(a) *Bunb. 41. of 20th Geo. 3.* (b) *Bunb. 68.*

inclination

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inclination to dismiss the bill for want of jurisdiction, but it ultimately went off on a point made by the evidence. In *The Town of Poole v. Bennet* (c), the Court retained the bill only because the defendant had admitted the plaintiffs' right. In the case of *The Town of Nottingham v. Wood* (d), a similar bill for toll of *ad per ton*, for goods navigated on the *Trent*, was demurred to, on the ground that it was properly determinable at law, by action or distress, and the rather for that it did not appear by the bill that the plaintiffs had ascertained their title at law. On the argument it was insisted for the plaintiffs, that the bill was in the nature of a bill of peace; to which it was answered, that the defendant was a stranger, and therefore it could not be a bill of peace. Secondly, the plaintiffs' counsel insisted, that there being a fee farm rent payable to the Crown, reserved by charter, it was a prerogative case; but that ground failed, because the rent did not appear to be reserved out of the toll, and therefore the demurrer was allowed. So here the defendants are strangers, and the rent is not reserved out of the toll, and there has been no trial at law.

The *Lord Chief Baron*, however, declared himself to be clearly of opinion, that the plaintiffs were entitled to proceed with the suit.

The plaintiffs then proved, by the depositions

(c) Bunb. 269.

(d) Bunb. 330.

of many witnesses, their constant receipt of the toll, as far back as living memory, and that it was taken out of the seller's sample, if sufficient, or, if not, out of the corn afterwards delivered to the buyers, and that it had been taken whether the corn was sold on the market-day or on any other day, or in the market-place or in any other part of the borough. They also proved the repair of the bridges and market-place at the expense of the corporation, and payment of the fee farm rent to the crown, and performance of the other considerations.

They then put in the charter of *Queen Elizabeth*, and a decree of the 14th of *Jac. I.* in a suit between themselves and *Green* and others, and the depositions of witnesses read on the hearing of that cause.

On the evidence of those proceedings being offered, it was submitted on the part of the defendants, that the decree in that cause ought not to be received in evidence in this suit, whatever use the plaintiffs might make of it, in the way of citation as a precedent, because the parties (defendants) were not in the same interest, nor stood *pari jure*, inasmuch as the defendants on that occasion were freemen of the borough, and the present defendants were not—and that this was a bill filed to establish the plaintiff's claim universally, whereas the object of that was a demand of tolls from certain individuals only, and

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who had admitted that the toll had been paid immemorially, which these defendants deny. In that case, also, none but freemen were interested, and the whole might have been collusive, or at least if a decree between such parties were held to be binding on strangers, it would open a door to collusion and fraud.


The *Lord Chief Baron*, however, permitted the plaintiffs to give the decree in evidence. *quantum valeat*, on its having been shewn that the bill and answer had been searched for and could not be found—saying, that if it were collusive the defendants should shew it to be so.

The foregoing evidence for the plaintiff having been then read,

Dauncey, *Martin*, and *Barber*, on that evidence, and the authority of the decree, rested their case.

As to the decisions which had been cited, they submitted that what was to be collected from them was entirely in favour of the plaintiffs' claim, for in none of them had the Court dismissed the bill: and they contended, that they ought not to be driven to the necessity of a previous trial at law, unless their remedy was solely, or more effectually to be found there; but a court of equity has a concurrent jurisdiction. In the case of *The Corporation of Carlisle v. Wilson*,

Wilson (c), the Lord Chancellor over-ruled a demurrer to a bill for an account of tolls thorough, which raised the question, whether a bill lay for such a toll, the objection being that the plaintiffs' remedy was at law; and in the common case of bills for tithes the plaintiffs had no doubt a remedy at law, yet such a ground of objection had never yet been taken.

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In the present case, the decree already made having established the plaintiffs' right, (they submitted) had rendered it unnecessary that the plaintiffs should first proceed at law; and neither the existence of the custom, or the legality of it, has been denied.

[*Lord Chief Baron*. There have been cases of this sort decided by Lord *Kenyon* and Lord *Thurlow*, where no action had been brought.]

They then suggested, that if the Court should consider that an action at law was necessary, the bill might be retained for a year, with liberty for the plaintiffs to proceed in the mean time at law: and they cited the case of *The Duke of Leeds v. New Radnor (f)*.

For the defendants it was contended, that if the plaintiffs were entitled to toll on the bulk of the corn sold by sample, they might have

(c) 13 Ves. 276.

(f) 2 Br. Ch. Ca. 338. 519.

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brought an action against the sellers to recover it. *The Bailiff, &c. of Tewkesbury v. Bricknell (g)*. And having insisted on the objection before taken collaterally to the bill, of a want of equity, (not having previously established their title at law, without which they would have no right to a discovery,) they submitted, that such a toll as was now claimed never could have had a legal existence, for it was at once a claim of a market toll and a toll thorough, and founded both on prescription and grant: and it is claimed not merely for corn sold on market-days, but on every day in the week, and in every part of the town—that there was no evidence given of what tolls the abbot had, and that the toll decreed to be paid to the plaintiffs in the suit in the reign of *James*, was quite distinct from that now claimed, and it did not appear for what the bill was filed—that there was no consideration for the toll; for the abbot was bound to repair the bridges &c. not in consideration of the tolls, but of his possessions in *Reading*, and the fee farm rent reserved to the crown by the charter, was payable not out of the tolls, but out of the rent of certain houses in the borough, the property of the corporation.

They cited the case of *Hill v. Smith (h)*, as establishing that a prescription for toll in respect of goods sold by sample, and afterwards delivered, could not be supported.

(g) 2 Taunt. 130.

(h) 4 Taunt. 520.

They

They also submitted, that the plaintiff should have filed separate bills against each of the defendants, for their interests were not joint. *Dilly v. Doig* (i),

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of READING,
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and others.

10th February.

RICHARDS, *Lord Chief Baron*, now delivered judgment. Having stated the nature and object of the suit—It is (said his Lordship) sufficiently proved, that these tolls formerly belonged to the abbey, and that they passed to the crown on its dissolution and from the crown to the plaintiffs: and I apprehend that the plaintiffs are entitled to the same tolls, whatever they may be, to which the abbey would be now entitled, in case it had not been dissolved, and still retained this part of its possessions,

Then the questions are, whether the plaintiffs are entitled to all or any of the tolls demanded by the bill, and having sued for them, whether they have a right to maintain this suit in a court of equity against these defendants. The first is purely a legal question, and it seems to me that it cannot with propriety be settled in a court of equity, without a decision first obtained in a court of law; but I also think, that with the advantage of a legal decision in favour of the plaintiffs, a Court of Equity has jurisdiction, and may support the claim, and make the decree which is prayed by the plaintiffs—at least to a certain extent, as

(i) 2 Ves. 486.

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far certainly as to establish the custom. There are many cases which have been decided within the principle on which this case is founded; indeed most of the cases, (if not all of them which have been cited for the defendants, admit the principle, even where the decisions have been adverse: and it appears to me that Lord *Hardwicke* decided *The Mayor of York v. Pilkington* and others, in 1 Atk. upon a ground which calls upon me to maintain this bill in favour of the plaintiffs, against the objection of the defendants, —provided the legal question should be decided against them. I see no difference in principle between the case at the bar and the cases respecting tolls to a mill where several tenants claim a title to profits in the toll, and cases which respect manors and other places where customs prevail, and where the courts maintain suits to establish them. I think, therefore, that this suit is proper with respect to the object of establishing the plaintiffs' right, and if the plaintiffs succeed at law, the Court, I think, must pronounce a decree accordingly.

It has been urged, on the part of the plaintiffs, that a decree has already been made in favor of the corporation upon this subject; and that therefore the Court ought now to proceed upon that judgment, without sending the case to the consideration of a jury in a court of law. Doubtless every just deference will always be paid to the judgment of a Court in former times, but the case
referred

referred to does not govern all the questions in this case, and I think also, that in other respects it does not apply to the case now, before the Court. That bill, it is true, treated the defendants to it as parties who had no connection with the corporation; but they, in their answer, insisted that they were freemen, and therefore exempt from the payment of the tolls. At the hearing it appeared that they were freemen, and judgment was given against them, they being freemen according to their own shewing. Now the present defendants are not freemen, and it does not follow that they are in the same condition with those defendants. They thought that the circumstance of their being freemen, excused them from the liability to the toll. We do not know how the Court might have considered this defence, if it had been set up in that case. At all events it appears, that that decision was against freemen, and the present bill is against strangers, that is, persons who are not freemen.

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In that view of the case I feel it my duty not to decide in favor of the plaintiffs immediately, notwithstanding that decree: and if that decree had not been in existence I think it would have been impossible to urge the propriety of my deciding without an enquiry in another place, and therefore I feel it my duty to retain the bill for a twelvemonth, with liberty for the plaintiffs to bring an action or actions against the defendants, as they shall be advised, with liberty to the Judge

1818.

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and others.

to indorse the *posita*, in respect of what tolls the verdict or verdicts shall be had.

It must be borne in mind too, that this is a case of toll claimed for corn sold by sample, and not only in the market-place but elsewhere, and therefore the issue must be so framed as to meet all those points.

Decree accordingly.

The Costs to be reserved generally.

## IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, L<sup>d</sup>. CH. BARON.

1818.

Tuesday,  
10th February.

DE WHELPDALE v. MILBURN and others.

THE plaintiff was lessee of the impropriate rectory of *Cumwhitton*, (*Cumberland*), under the Dean and Chapter of *Carlisle*, and he had filed this bill for an account of tithes.

A measure of oatmeal, payable in lieu of the tithe of corn and grain, is a good modus.

The plaintiff had filed a similar bill, in 1809, for the same object, against other occupiers. They pleaded the same modus; but the Court, on that occasion, decreed an account, (without prejudice to the defence in any future suit,) because they had not properly laid the modus, in having stated it to be payable 'by certain occupiers,' without shewing more particularly *by whom* it was payable.

Where tithe of corn has never within memory been payable in a parish, and a contributory payment exempting the whole parish, is paid by certain, though not all, of the owners and occupiers of estates, the question of whether farm or district modus, must go to an issue.

Those defendants then filed a cross-bill, to establish the same modus against the plaintiff, as lessee, and the Dean and Chapter of *Carlisle*, as impropriate rectors of the parish; but that bill the

An answer, by a former rector, to a bill filed to establish a modus of a certain measure of meal, as to one

farm, admitting that the parish is exempt, in consideration of a commutation for meal, is not only admissible, but strong evidence to prove a district modus.

A modus, laid to be payable by 'certain occupiers,' uncertain and insufficient.

In a bill to establish a modus against a dean and chapter, as rector, the ordinary and patron are necessary parties.

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et  
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and others,

the Lord Chief Baron ordered to stand over, (giving liberty to amend, on paying the costs of the day,) for defect of proper parties, the Ordinary (the Bishop of *Cumtula*) not having been made a defendant.

The present defendants set up a *parochial* modus of fifteen eskeps of oat or havermeal, payable yearly, on or about the 1st *June*, to the rector &c. in lieu of the tithes of corn and grain, by the several and respective occupiers of lands within the parish of *Cumwhiton*. And they further stated, that for the convenience of the several occupiers, the eskeps had been apportioned in certain shares amongst themselves, by agreement, but that the rector was entitled to resort to any of the occupiers for payment.

The plaintiff endeavoured, by old leases of the tithes, reserving to the rectors a rent of fifteen eskeps of meal, and other evidence, to shew that the fifteen eskeps of oatmeal were paid, not as tithe, to the rectors, but as rent, in consequence of an understanding between their lessee, and the occupiers, producing a contributory arrangement, conformable with such payment—or if that were not so, that it was, at most, a farm modus, covering only the respective farms of the several contributors, and not a payment in lieu of the tithe of corn of the whole parish. And in support of that part of their case they shewed, that there were several farms which did not bear any part of the contribution towards the payment; and they contended,

contended, that if they were farm moduses, they did not cover any other part of the parish than the particular farms; nor any part of the *newly-inclosed* lands belonging to the farms inclosed under the 36 Geo. III.—as held in *Moncrester v. Watson* (a).

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DE WRELP-  
DALE  
P.  
MILBURN  
and others.

The defendants, on the other hand, proved general non-payment of the tithes: and they gave in evidence the answer of the Dean and Chapter in a suit instituted against them in this Court, in the 3d James II. by *John Bird*, owner and occupier of an estate in the parish, to establish a modus of three bushels of oatmeal *in lieu of all tithes*. In that answer was the following passage:—  
“ These defendants say, that the tithe of wool and lamb, calves, foals, pigs and geese, and all other mixed and small tithes, are due and payable in kind by the said parishioners; but as for prædial tithes, they do believe that they are payable and paid yearly by the parishioners, in general certain measures of meal, (to wit) fifteen eskeps of oatmeal, for and in lieu of the tithe of corn and grain growing *within the said parish* and that the complainant, for his particular part and proportion thereof, does pay three bushels of meal, or thereabouts, yearly, for his tithe of corn and grain; but these defendants know not, nor do believe that the said oatmeal was ever paid by the complainant or his ancestors, or accepted and received by these defendants, and their predeces-

(a) 3 Burr. 1375.

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 DE WHELP-  
 DALE  
 &  
 MILBURN  
 and others.

sors, in full of all tithes for the said messuage and tenement, as in the bill is suggested, but only as a modus for and in lieu of the tithe of corn and grain as aforesaid."—The counsel for the defendants also adverted to the local case of *Sewell v. The Dean and Chapter of Carlisle* (b), in which this modus was recognized as being a well-known subsisting modus: and they contended, that this was a parochial modus, and therefore covered the newly-inclosed, as well as the old inclosed lands allotted to the farms. *Stockwell v. Terry* (c), *Bishop v. Chichester* (d).

The discussion of this case occupied several days, and the admission of the answer in the cause of *Bird v. The Dean and Chapter of Carlisle*, as evidence in this cause, was strongly objected to, on the ground, that the Dean and Chapter of that day could not bind their successors by any admissions—that there did not appear to have been any decree in the cause—and that the bill, in answer to which it had been put in, had only set up a *farm* modus; but the Lord Chief Baron admitted it: and the questions ultimately resolved themselves into that on the corn modus; on which

RICHARDS, *Lord Chief Baron*, now gave judgment:

It is admitted, that all titheable matters are

(b) 1 Wood's Decrees, 139. (d) 4 Gw. 1323.

(c) 1 Ves. 115.

payable

payable in kind, except corn and grain; with the exception of that, therefore, there must be a decree for an account of all the tithes sought by the bill. [His Lordship then stated the particulars of the claim in that respect, and the defence set up.] \* The objections which were made to the legality of that mode of commutation (the eskeps of oatmeal) were not very earnestly pressed, and no case was cited against it. The only question therefore is, whether the contract is sufficiently ancient, and whether it is borne out by the evidence.

1818.  
  
 DE WHELE  
 DALL  
 &  
 MILBURN  
 and others

It has certainly been proved satisfactorily, that no tithe in kind has ever been paid in this parish for corn, as far as memory can reach. The mode of rendering the payment anciently is not very accurately described, nor is there any account of its origin given even by evidence of reputation, nor any explanation of the reason of the render, unless it were in lieu of tithes. All other tithes are payable in kind: it must, therefore, have had relation to the tithe of corn. I have no difficulty in saying, that I feel considerable embarrassment on the evidence which has been given. The observations which have been made on it deserve much attention, and I cannot see any thing which enables me to say, whether the payment has been made as a modus, or whether, if it were, it has been payable for the whole of the parish, or only for parts of it. But the answer which has been read relieves me from great part of the difficulty.— [His Lordship read the passage already extracted.]  
 That

1818:

DE WHELP-

DALE

MILFORD  
and others.

That is clearly a very extensive and general admission. Whether the defendants were well advised or not, in so answering, I do not pretend to say; but after that admission it is impossible that I can decree an account of the particular tithe; unless the plaintiff take an issue; and that shall be found in his favor.

The following issue\* was therefore ordered:—

Whether from time &c. there have not been, and was then payable to the rector &c. by the several and respective occupiers &c. fifteen casks &c. as a parochial modus or prescriptive payment, for the tithes of corn &c. on all the lands, as well old inclosures as new.

On the trial of the issue, Mr. J. Bailey laid great stress, in directing the jury, on the evidence of the answer, (observing that it was much stronger than if it had been merely the answer of an individual, and that it was put in at a time when the rector's rights were much more capable of proof,) as being very cogent testimony against the defendants on this issue.

GIBBONS v. The COMPANY of PROPRIETORS of  
the WATERLOO BRIDGE, and WILLIAM BAY-  
LEY, their Chief Clerk.

1818.

Thursday,  
10th February.

Demurrer.

TO this bill, which was filed by the plaintiff, an annuitant, (on behalf of himself, and other annuitants and creditors, &c.)—praying a discovery, and an account of the rates and tolls taken upon the bridge since it had been opened, and the other revenue of the company accruing since the annuities had been granted, and the application thereof—and that the overplus, after defraying the necessary current expences, might be applied in payment of the arrears—and for the appointment of a receiver

A demurrer to a bill, by an annuitant, against an incorporated company, and their clerk, for a discovery of funds not appropriated, over-ruled on the ground of the clerk joining in the demurrer, he having no right to demur.

The clerk of such a company is without the general rule, and may be made a defendant, although he have no interest, and might be examined as a witness.

The defendants demurred, as to so much as sought a discovery upon the allegation—that the tolls authorized by the act of parliament, or some other and greater tolls, had been taken and received by the defendants: and that the same amounted to more than sufficient for defraying the necessary current expences for carrying the acts of parliament into execution, and that there was in the hands of the treasurer a large surplus; and upon the allegation of the pretences suggested, and the charges of the contrary, and the account required from the defendant Bayley, the company's clerk,

Shewing—

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Shewing—that by the rules of the Court there can be no compulsion to set forth any matter, which may subject the party to penalty or forfeiture—that it appeared by the bill, that if it should appear to the commissioners appointed by the act, that the defendants had not appropriated the tolls, or should have received dividends of more than 10*l. per cent.* on their shares, any five of the commissioners were required to order the defendants to pay such sums as should be ascertained to have been not appropriated or misappropriated, together *with the sum of 500*l.* as a penalty* and forfeiture, to be recovered by action at law\*—and that inasmuch as the discovery sought would subject defendants &c. and for divers other causes.

*Dauncey, Martin, and Wray*, in support of the demurrer, contended, that the liability of the defendants to the penalty was a sufficient reason, why they ought not to be compelled to the discovery sought—that the making the clerk a defendant, was merely for the purpose of enabling the plaintiffs to enforce the penalties: and to the interrogatories framed for that purpose alone, the defendants had demurred—that the answer of the clerk could not be read against the company, and he might be examined as a witness, having no interest in the subject-matter.

\* The acts had so provided, and the provisions were set out in the bill which charged the defendants with having not appropriated and misappropriated the tolls received by them.

The

The *Solicitor General, Horne, and Cooper*, for the bill, urged, that the effect of this demurrer being allowed, would be, to give to the penal clause the operation of protecting the defendants from rendering any account. Here too all the defendants had demurred, whereas *all* of them were clearly not liable to the penalty; for the clerk was certainly not liable, and could not refuse, on that ground, to answer any question put to him as a witness: nor has he any interest, and therefore ought not to be permitted to demur to a bill for a discovery, to which, justice and the reason of the proceeding, required that he should be made a party.

RICHARDS, *Chief Baron*. I never knew an instance of a clerk demurring to a bill of this sort. Some of the questions put do not lead to a liability to penalties. I have no difficulty in saying, that the demurrer cannot be maintained, for it is clear that a clerk to the defendants cannot demur on the ground that his principals are liable to penalties, and his answer could not be read against them. It has been said, that the clerk ought not to have been made a party, as he has no interest, and might be examined as a witness. But this is the case of a corporation, and therefore from necessity it has been allowed, as an exception to the general rule that one who may be a witness cannot be made a defendant to a bill for discovery\*. As he has, therefore, clearly no

\* Vide *Wych v. Meal*, 3 P. Wms. 310. *Le Texier v. Margravine of Anspach*, 15 Ves. 159.

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right to demur, this demurrer is bad for joining him, and it must on that ground be over-ruled.

GRAHAM, WOOD, and GARROW, *Barons*, con-  
 ccurring,

Demurrer over-ruled\*.

\* *Vide Attorney General v. Duplessis*, Parker, 144.

## IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, L<sup>d</sup>. CH. BARON.

JENKINSON v. ROYSTON and others.

1818.

10th February.

THE plaintiff filed the present bill, claiming, as rector of *Leverington*, (*Cambridgeshire*,) all the great and small tithes in kind, against the defendants (occupiers), for an account of the tithe of hay, artificial grasses, and fodder, taken from the lands

A defence to a bill for tithes, of a district *modus*, where the defendants do not state on the record, and prove by evidence an occupation therein, must fail.

A custom—(to pay) for every foal 1*d*.—for every milch cow 2*d*.—and for every heek-sorth, or heifer, that had had but one calf, 1*d*., for and in lieu of milk, and all profit arising by such cow or heifer, except the calf.—good; notwithstanding it be not accurately laid, the redundant words at the end being rejectible as surplusage.

Calves, in kind, to be delivered at the will of the owner, after they were three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed; the parson, if he delayed the fetching, to pay for the keeping.—Pigs, in their kind, to be delivered at the will of the owner, after they were nine days old; and if the parson delayed to fetch them, to pay for the keeping afterwards, as reason should require, or the parties could agree,—bad, for uncertainty and unreasonableness—being vitiated by the qualification of the delivery at will; and the parson to pay for the keep until delivered.

Lambs, in their kind, to be delivered the 1st day of *May*; and if under seven, to pay for every lamb a halfpenny; and if seven lambs, and under ten, to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny: and so likewise for any odd number of lambs: and so likewise for calves: but that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were sold for; and that tithe of lambs was to be paid in kind, as well those that fell after, as those that fell before the 1st of *May*, respect being always had to the number of lambs, according and puranant to the above prescription or modes, save that those that fell after *May-day* were to be kept by the owner until a month old, and if longer, he was to be paid for keeping; and so of lambs that fell within a month before *May-day*, which were to be kept by the owner until a month old, and if longer, he was to be paid for keeping,—bad, because unintelligibly laid, and binding the parson to pay for keeping the tithe animal beyond a month old.

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and others.

The farmer is, in general, bound to keep it till it be able to live without the mother: but an established custom may controul the rule.

Geese and Pigs, in kind, to be delivered before *Midsummer*; and if any person should have under seven pigs or geese, he was to pay, for every pig or goose, a halfpenny; and if he should have seven, and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a piece for every one, and so for any odd number of pigs or geese,—good.

in their respective occupations, and of various small tithes therein enumerated.

The defendants admitted the plaintiff's title to the tithes sought, or to certain moduses, compositions, and payments, in lieu thereof,

The answer then stated, that by custom at *Easter* every householder and inhabitant within the parish was to resort to the church or parsonage-house, and there to reckon and pay the following moduses:—

For

Bees: for every stock driven or smothered, whereof profit is taken, 2d.—*quere*.

Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped; and if any person should sell sheep after *Candlemas*, and before clipping, to pay for the wool, for every sheep 1d. if he sold them out of the parish,—good.

Hemp and fembie the tenth sheaf, when it was pulled, withered, and threshed; and that the withering and threshing of hemp and fembie, was to be soundered, reamed, and taken, for and in lieu of the seed,—good.

Rape-seed, the tenth bushel, ready dressed, the parson allowing for the dressing 1d. the bushel,—bad, for omission of fractional proportions.

For onion-seed the tenth bed, if more than half a pound sown: for less, none,—bad.

For every acre of reed-ground hocked, cropt, or mown in the year, 1d.—good.

Eggs: for every hen or duck two eggs; and for every cock or drake, either of them, three eggs,—bad—deficient consideration, and being *customs generis*.

The inhabitants to pay to the parson yearly, for every acre of fief ground in the parish, for herbage 1d. or the fall, at the parson's election,—bad.

All that follow—bad.

A decree, professing to establish customs of tithing, and modes of payment, some of which being obviously not legal moduses, founded on agreements not ratified by the ordinary and patron, and not on a *bonâ fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties, not conclusive or binding either on the Church or the Court.

For grounds mown between the sea-dyke and cattle-dyke, 2d. the acre, and in *Plane-field*, 1½d. the acre. Item.—For all the grounds mown between the high sea-dyke and cattle-dyke, 1d. the acre, for and in lieu of all hay grown and cut within the said places.

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Item.—For every foal, 1d.—for every milch cow, 2d.—and for every heckforth or heifer that had had but one calf 1d., for and in lieu of milk and all profit arising by such cow or heifer, except the calf.

Item.—Calves, in kind, to be delivered at the will of the owner, after they were three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed, the parson, if he delayed the fetching, to pay for the keeping.

Item.—Lambs, in their kind, to be delivered the first day of *May*, and if any person had under seven lambs, to pay for every lamb a half-penny, and if he had seven lambs and under ten, he was to pay one lamb, and to be allowed for every lamb that wanted of the ten a half-penny, and so likewise for any odd number of lambs, and so likewise for calves. But that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were

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 &  
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sold for (a): and that tithe of lambs was to be paid in kind, as well those that fell after as those that fell before the first of *May*, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after *May-day* were to be kept by the owner until a month old, and if longer, he was to be paid for keeping; and so of lambs that fell within a month before *May-day*, which were to be kept by the owner until a month old, and if longer he was to be paid for keeping.

Item.—Pigs, in their kind, to be delivered at the will of the owner, after they were nine days old, and if the parson delayed to fetch them, he was to pay for the keeping afterwards, as reason should require, or the parties could agree.

Item.—Geese, in their kind, to be delivered before *Midsummer*, and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven and under ten, he was to pay one; and to be allowed for them that wanted of ten a halfpenny a piece for every one, and so for any odd number of pigs or geese.

(Certain *Easter* offerings.)

(a) *Vido Leathes v. Newitt*, ante, vol. iv. p. 374; and *Layng v. Yarbrough*, ib. p. 495-6.

Item.

Item.—Bees: for every stock driven or smothered, whereof profit is taken, 2*d*.

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Item.—Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped, and if any person should sell sheep after *Candlemas*, and before clipping, to pay for the wool, for every sheep 1*d*. if he sold them out of the parish.

Item.—Corn: if it be bound the tenth sheaf, and if it be loose the tenth shock, but which custom is done away by act of parliament.—Hemp and fumble: the tenth sheaf when it was pulled, withered, and threshed, and that the withering and threshing of hemp and fumble was to be construed, deemed, and taken, for and in lieu of the seed.

Item.—Rape-seed: the tenth bushel ready dressed, the parson allowing for the dressing 1*d*. the bushel.

Item.—Wood: the tenth tree when it was felled, of twenty years growth or under, which twenty years, if never felled before, was to be reckoned from the first planting, but if felled before, from the last felling thereof, (but which custom was done away by act of parliament).

For flax: the tenth pottle, when watered and bleached, but which custom defendants waive.

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and others.

For onion seed: the tenth bad, if more than half a pound sown; for less, none.

Item.—For every acre of seed-ground that was hooked, cropped, or mown in the year 1818.

Item.—At *Easter* the eggs: for every hen or duck, two eggs, and for every cock or drake, either of them, three eggs.

Item.—The inhabitants to pay to the parson yearly, for every acre of seed-ground in the parish, (*Throckenholt* not included,) for herbage 1*d.* or the fall, at the parson's election — for every dove-house 6*d.* — for every house having an orchard or cherry-ground, so as it was above half an acre of land, 1*s.* — for every acre of new-improved ground in the marsh or fen, which should be mown, 2*d.* and for every such acre fed there 1*d.* or the fall, at the election of the parson. (Grounds sown with *clover*, and such like seed, for the use and purpose of feeding horses, sheep, or beast, neat or profitable, to be accounted as feeding land, and not otherwise.) And in case the parson should take the fall, then in such year he was not to have the penny the acre herbage, neither in the old grounds or in the new-improved grounds. — That tithe of *cole-seed*, *mustard-seed*, and *turnip-seed*, upon lands tilled, plowed, or sown, or ordered to that purpose, was to be paid in the same manner and proportion as rape-seed was said to be payable. That madder, being a new improvement,

ment; was to be paid in kind: That for every mill for the grinding of corn within the said parish, such modus or payment to be paid therefore, as was ~~and had been theretofore~~ paid for the same, due notice to be given to the minister to take his tithes before corn carried off the premises; that by the word 'fall' was meant the profit of the particular tithe, which the incumbent might take as above, abating the penny an acre, whether fed with profitable, or unprofitable cattle: the clergyman to take either at his choice, but not both. (Other personal dues, to be paid as theretofore.)

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Item.—Every stranger occupying any feedings, grounds, or pasture, was to pay the same acreage for the grounds, or pasture for herbage, after the custom of the field, as the inhabitants paid for mown ground or the fall, at the parson's choice.

The answer then stated, that *the defendants had annexed thereto, by way of schedule, a map or plan*, wherein were shewn and distinguished the grounds between sea-dyke and cattle-dyke—the grounds in *Flanefield*—the grounds between the high fen-dyke and cattle-dyke—the grounds in *Throokenhalt*, and the new-improved grounds in the marsh and fen therein-before mentioned, with *the quantities and boundaries thereof* respectively.

To prove these payments set up as moduses,  
the

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the defendants produced receipts and books of the former rectors, which fully established that part of their case. They also produced a document which they urged as being conclusive of this question in their favour. It was a decree of this Court made in a suit instituted by an occupier, in the year 1695, against the then rector (*Swaine v. Pern*) (b), for the purpose of establishing a sort of conventional terrier of alleged moduses and customs of tithing throughout the parish, with a view to fixing, by the sanction of the Court, a certain rate or custom of tithing between the rector and the parish, in termination of long-continued disputes between them, founded on former agreements entered into between both parties. The plaintiffs in that suit were the parishioners and inhabitants of the parish, and the rector was defendant. The bill recited the various customs of tithing (as set forth in the present answer, concluding with the modus for eggs), as prevailing in the parish (referring to reckoning books, as they were called, of former parsons), and that about the year 1621, divers differences about such customs had happened, which by the mediation of the Judge of the Isle of Ely, and several Justices, had been accommodated and reduced to writing, and signed—that about 1681, the defendant had endeavoured to overthrow the same, and brought several vexatious suits in the bishop's

(b) 1 Wood's Tithes Decrees, 341; the substance of which is shortly expressed here for convenience.

court,

court, and in this Court, which were accommodated, when the defendant *Penn* and the parishioners, about the 19th of *April*, 1688, came to a further agreement of tithing, over and besides the former customs, that the inhabitants were to pay, &c. (the rest of the moduses). That the defendant afterwards sued the plaintiffs several times for the tithes in kind, and therefore the plaintiff, for relief, prayed the aid and assistance of the Court. The defendant put in his answer, and the cause was heard, when it was decreed that the ancient prescriptions or moduses, as mentioned in the agreement of 1621, and the additional agreement of the 19th of *April*, 1688, should be ratified and confirmed, and for ever established by the authority of the Court, with certain alterations and explanations (which were stated): *with which alterations and explanations* the said prescription or ancient modus, specified in the writing dated 1621, and the additional agreement of 1688 were thereby ordered to be for ever thereafter observed, kept, and performed, by all the parties interested and concerned therein.

*Dauncey, Martin, and Simpkinson*, for the plaintiffs, took an objection, in the first instance, to the bill, that it had referred to a map of the lands for which the modus for hay was claimed, to be payable without setting out the quantities or boundaries in the body of the bill,—that the map itself was defective, in not describing and setting out the situation, and whole extent and boundaries

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boundaries of those lands, and that it had not been proved by depositions. [But that objection the Lord Chief Baron, for the present, over-ruled, saying, that if it should be necessary to prove the map by depositions, he would still give the defendant leave to exhibit an interrogatory for that purpose.]

They then insisted, that the money payments set up as moduses were for the most part in no respect entitled to be so considered, for that, excepting some of those covering the smaller and more minute articles, there was neither certainty or precision in the pleading of them, nor reason or simplicity in their nature. The moduses for every milch cow and heifer that has yielded but one calf, for and in lieu of milk, they admitted might have been good, but for the qualification added, and (for and in lieu of) all profit arising by such cow or heifer, except the calf, which they submitted rendered the modus as laid so confused and unintelligible as to make it impossible to know what the able matter it was intended to convey, if it could be understood at all. As to the modus for calves, their being stated to be delivered at the will of the owner, was at once destructive of the legality of such a payment, for it would furnish a constant answer to the clergyman who should demand his tithe of calves, and he never could enforce such an arbitrary modus — that the modus for lambs also was manifold

manifold and inexplicable, and it was rendered more so by having superadded to it, and mixed up with it, a similar modus for calves, which they submitted had never before been seen, the whole concluding with another custom as to the lambs — and that the payment for pigs was open to the same objection as was destructive of the modus for calves. Against the lesser modus, also, they urged the arguments afterwards adopted by the Lord Chief Baron in delivering judgment.

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As to the decree on which the defendants placed great reliance (and which the Court was at first disposed to consider as an authority of great weight), they contended, that as it was not grounded on a bill to establish a modus, such a proceeding, of so comparatively recent a date, could not make or establish a modus, or give to any previous agreement between the parties the effect of an immemorial contract. And they commented much on the nature of the decree, and the terms of the agreements on which it had been founded; from all which they drew the inference, that the payments were modern, and not immemorial, even in their origin; and that, if they had not been so, the effect of their having been so, might have been destructive of them as introduced, and that even if it had been a decree on a bill to establish them. They observed, that some of the articles prescribed for *col nomen* were of modern introduction,

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tion, as above;—that the payments, such as they were, were so badly stated, and so ill laid, that no decree or authority could make them moduses, either in form or effect. And to shew that such agreements, although so ratified by the decree of a court of equity, had been held not to be binding on the successors of the incumbent, they cited the case of *The Attorney General and Blair v. Cholmley* and others (c), in 1765, where the then Lord Chancellor had so held.

The *Solicitor General* and *Boteler* for the defendants—as to the objection taken to the description of part of the lands, by reference to a map,—cited *Clarke v. Jennings* (d), where that objection had been taken and over-ruled, and submitted that it was enough if the defendant made out his case in any way sufficiently intelligible to the Court—*Stawell v. Atkins* (e).

To that the *Lord Chief Baron* assented.

With respect to the moduses, they urged that the decree of the Court of Chancery, in *Swaine v. Penn*, was conclusive against any objection which could be taken to them, either in form or substance. They said that it was not intended to set up that document, as having created the modus, but as being a judicial recognition of rights, then ancient, founded on immemorial cus-

(c) 3 Gw. 914.

(d) 4 Gw. 1424.

(e) 4 Gw. 1434—and 2 Anstr.  
164.

toms, as the decree rectified, and that it was as binding on the parties to the suit, and all persons standing in the same situation, as any other decree in suits instituted *in perpetuam rei testimoniam*.

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As to the explanations and alterations which had been alluded to, they submitted, that they were merely introduced to render the ancient payments more conformable with the agriculture of later times, which might be done by consent of all parties interested, and with the sanction of a court of equity, and that, they observed would account for any modern expressions used in the decree, and the articles of modern introduction there mentioned, the foundation of which would be still, notwithstanding those objections, the ancient immemorial contract in which the payments had originated.

They endeavoured, from the terms of the decree, which they minutely considered and investigated, to show that enough might be collected from it to satisfy the Court that the money payments which had been the subject-matter of dispute, were in effect legal moduses, and they urged that in all events the authority of the decree was itself conclusive on the Court by which it had been made, for the purpose of setting the doubts for ever at rest.

They finally observed, that moduses very similar

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lar to those now objected to, had been heretofore established in a suit instituted for that purpose in this Court, as far back as 1731; for in the case of *Brincklow v. Edmunds* (f), moduses laid in the same way for lambs, pigs, and eggs, had been held to be valid.

*Dauncey* having replied,

RICHARDS, *Lord Chief Baron*, delivered judgment.

[Having noticed the admission by the answer of the plaintiff's general right, and stated the several customs of tithing and money payments set up by the defendants as moduses.]

As to the three first (said his Lordship),—the 2d. *per* acre for grounds mown between the sea-dyke and cattle-dyke, the three halfpence *per* acre in *Flanefield*, and the modus of a penny *per* acre for the grounds mown between the high fen-dyke and cattle-dyke, alleged to be payable in lieu of hay cut within those places,—it is impossible that they can be maintained in this suit, even supposing them to be good moduses; because it has not been proved in the cause, nor is it indeed alleged upon the record, that either of the defendants occupy any part of those grounds. But it being admitted, that tithe hay is due in the

(f) Bunb. 307. 2 Gw. 711.

parish generally; and that those lands only are covered by a modus; and the defendants not having proved that they occupy any part of those lands, there must of course be an account decreed for the tithe of the hay taken there. Whether they may, as occupiers, think it advisable to set up these payments in respect of the same lands as are now alleged to be covered by them as moduses on any other occasion, is another matter. On this record, I must decide against them, whatever respect may be due to the proceedings in the ancient suit, the decree in which has been so much relied on, on their part, in this cause. Of those proceedings I shall not say any thing at present, but proceed to examine the legal character of the customs, as if that decree had never existed.

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Having disposed of the money payments for the tithe hay, the first of the other moduses insisted upon is the penny for every foal; and to that I do not see any objection, provided it can be proved in point of fact, and therefore there must be an issue upon that if the rector shall think proper to take one.

The next modus is, 'for every milch cow two pence,' and 'for every heifer that has had but one calf, one penny, for and in lieu of milk, and all profits arising by such cow and heifer, except the calf.' Now, I certainly see no objection to that, and though a great deal of observation has been made upon the addition of those last words, (the profits arising from the cow and the heifer),

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I confess I do not perceive the difficulty said to arise from the introduction of those words, for they may be all rejected as surplusage, and therefore they afford no solid ground of objection.

The next prescription is the custom with respect to calves. [His Lordship read that custom, p. 497]. So that the calf is to be kept till it is three weeks old, and also until such time of the year as the owner thinks best to spare it. Now, the law in general fixes the time when the animal is enabled to live without the mother, as that at which it is to be rendered as tithe; but that rule may certainly be governed by the various local customs, which may obtain in different places. This particular custom, however, seems to me to be bad, on the statement of it; for it is uncertain and altogether unreasonable, because if the delivery of the calf be to be subject to the will of the owner, that will may be determined perhaps the moment after the three weeks have expired, or not till the end of half a year, and yet the person is obliged to pay for the keeping, if he delay the fetching, although the farmer, if he choose, may keep it for an indefinite time. I am, therefore, of opinion, there must be an account taken of the tithe of calf.

[His Lordship then stated at length the custom with respect to the lambs (pages 497-8.), and also that united with it for calves, observing, in the progress of his statement, at the appropriate passages, that thus there were in terms two customs  
stated

stated for calves: and that if the lamb should not be fit to be delivered at a month old, the farmer was to be paid for keeping it beyond that time, although he is bound by law to keep it till it shall be fit for delivering.]

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Now really (continued his Lordship) I cannot perceive the sense or reason of this allegation of such a payment set up as a modus, and therefore, not understanding it myself, nor seeing how it is possible to be made intelligible, I must treat it as incomprehensible and unreasonable, and pronounce it therefore a bad custom.

The next is pigs, in their kind, to be delivered at the will of the owner, &c. [His Lordship having read it, (page 498).] That custom, stating that the titheable article is to be delivered at the will of the owner, is liable to the same objection as the custom for calves, already disposed of; and as it seems to me to be a decisive objection, that therefore must also be considered invalid, and there must be an account for the tithes in kind.

To the next custom, for geese and pigs [stating it, as in page 498], I do not know that there can be any reasonable objection, and therefore there must be an issue directed to try that modus, if the rector should require it.

As to the modus for bees, there has been no evidence offered: probably the quantity was not worth notice.

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To the modus for wool, as stated, I do not see any objection.

For corn there must be an account.

The next is the custom respecting rape-seed, 'the tenth bushel ready dressed, the parson allowing for the dressing 1*d.* the bushel.'

The objection to that is, that if there be not ten bushels, or if there be any smaller quantity than ten bushels, or any intermediate number less than ten, nothing is said as to what is to be paid for such intermediate quantities. That modus, therefore, is improperly laid: it should be stated much more accurately and distinctly than it is stated here, to be of any avail; there must therefore be an account taken of rape-seed.

As to the tithe of wood, it does not appear by evidence that any had been cut by the occupiers: that therefore is out of the question.

There was a custom of tithing onion-seed stated; but that was admitted to be bad.

The custom 'for every acre of reed ground that is hooken, cropped, or mown, in the year, 1*d.*' does not appear to be objectionable.

But the tithe of eggs, which is laid thus, 'for every hen or duck, two eggs,' (to cover any whatever quantity, if there were five hundred),  
'and

‘and for every cock or drake, either of them three eggs,’ that certainly cannot be good.

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The next custom (as stated) is, that the inhabitants are to pay to the parson yearly for every acre of fed ground in the said parish (*Throckenholt* not included) for herbage, 1*d.* or the fall, at the parson’s election. (What that means I do not know.) That, however, cannot stand, for *Throckenholt* is not distinguished from the rest of the parish by any sort of description, and therefore the objection applying to the three first moduses applies here, and destroys that custom in the present case.

As to the other moduses (for dove-house — for houses having an orchard or cherry-ground — for every acre of new-improved grounds in the marsh or fen, which shall be mown, and for every such acre fed, or the fall, at the election of the parson, and all the succeeding moduses, and their qualifications, pages 500-1,) his Lordship observed collectively, that (always bearing in mind throughout this case, that these grounds were part of the *Bedford Level*,) all those statements of customs, and the accompanying observations, could only be considered in the light of matter of interpretation on doubts, which probably arose, from time to time, in consequence of the constant improvements and changes which took place in that particularly uncultivated spot, and that they were nothing like customs recorded or established, even if they had not been so alto-

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gether unintelligible as they were: and that as far as they could be understood, they had none of the characteristics of legal moduses, and could not therefore be so considered.

Then, (said his Lordship) the defendants' counsel have relied much, and with reason, on the decree made in this Court in the year 1695: and it is, in truth, the great muniment on which their case depends for support. But if I am right in the opinion which I have given, that with respect to some of these payments, they are not such as can be regarded as moduses in point of law, I should consider it a very great hardship on the plaintiff if I were obliged, of necessity, to hold myself bound by that decree, as it is called. If, indeed, it had been really a decree, properly so termed, judicially establishing, as moduses, the payments which were the object of the suit, I should have had great difficulty in disengaging myself from it, however unjust I might consider it; but it is no such thing. The first objection to it is that persons, who were proper and necessary parties to that suit, (the ordinary and patron) were not before the Court; and the result furnishes a strong proof of the wisdom of courts of equity, in requiring all proper parties to be present before a decree can be made. I will venture to say, that if the ordinary and the patron had been defendants in that suit, and had done their duty, that decree never could have passed in these terms. It was, in truth, nothing more than a decree, to establish an agreement between the parties, entered into among themselves,

themselves, and that too a modern agreement. There are mixed up in the decree some payments, which were probably ancient, but they are blended with the others, which are clearly not so, and I have now no means of distinguishing them from the rest. The answer of the defendant in that suit has been read in this cause, and I have since read it over myself with great care. It exhibits a very striking picture of the miseries of persons in the situation of rector at that time, when they were completely in the power of their parishioners, and were tossed to and fro at their will and pleasure. No wonder then that the clergy of that day frequently entered into such agreements before they became rectors, in order to obtain something like ease and quiet, when they were placed in that situation. When, therefore, I see what is called a decree, affecting to establish money payments as moduses; but which ought not to be treated as a decree, (because it was made in a suit, which was suffered to proceed, although necessary parties were not in Court, and which, even if they had been there, can only be considered in the light of a decree founded on what was put upon the record without opposition, and by consent of the parties, and not as being the effect of a hearing on the merits in an adverse suit to establish such moduses)—I cannot but regard it as a decree, not pronounced on any fact authenticated by evidence, but, on the contrary, on mere statements of what are obviously not facts. How then can I consider it binding, or, at least, such as cannot possibly be resisted. It is clear, that

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some of the payments mentioned in that decree were, in fact, considered by the Court as not being moduses, although the usual and proper parties were not there to contest their validity, and press the existing objections. Then other payments, which might, perhaps, have been properly considered as ancient payments, are not distinguished in this instrument, nor can they now be so, and I cannot see any reason to hold myself bound by a decree where I find that among the moduses there established, there are some which are not sanctioned by law. If I am right in that opinion, there can be nothing in such a decree to prevent my expressing that opinion, and acting upon it accordingly. I therefore think myself not only at liberty, but that I am compelled to decide this cause as I have intimated my intention of doing.

In addition to all this, we cannot but take into consideration the state of this part of the country, at the remote period whence legal moduses take their rise. These grounds belong to the *Bedford Level*, which must have been at that time nearly all under water, or at best in such a state, as that the greater part of it could have produced but little titheable matter. Looking retrospectively to time beyond legal memory, (beyond the reign of *Richard I.*) can we reasonably conceive that any agreement for most of such of the compositions, as are stated in this decree, could have been then made between persons in the situation of these parties. At that time there could have

have been no prospect of the improvements which have, in very modern days, taken place in that part of the country, and which are entirely owing to causes which could not have been foreseen or expected, even so short a time back as twenty years before they commenced. The great improvements made of late years in the *Bedford Level*, to which I have alluded, are even now but just beginning to have any visible effect.

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On the whole, therefore, it appears to me, that we cannot rationally or justly consider the payments which that decree contemplates to be good moduses as against the parson, who, it appears, from all the circumstances in evidence in this cause, was wholly incompetent to act for himself at the time when the decree was made, and that it was certainly made in the absence of those, who are the natural and legal protectors of the revenues and the rights of the Church.

Under these circumstances, I think myself bound to direct an account of all the titheable matters which the defendants have taken from these lands, except such as are covered by the moduses which I have determined ought to be tried.

Decree accordingly.

Sir

1918.

Wednesday,  
11th February.

Sir WATKIN LEWES v. MORGAN and LEWIS.

Where a receiver of rents and profits is enjoined from further receiving, &c. the Court will extend the injunction to his agent, (an attorney in this case) and commit him also for a breach of the order, although he lying at a distance in the country, have not been regularly served with the injunction, if sufficient circumstances can be shewn, to afford fair and satisfactory evidence that such agent knew of the order—as if his principal have published the opinion delivered by the dissentient judge only, and a statement of the judgment of the Court has appeared at the same time in the provincial papers.

*JERVIS* now shewed cause against an order which had been obtained for committing the defendant *Morgan*, and his agent, the other defendant, an attorney residing in *Carmarthenshire*, for a contempt in disobeying an order of the Court, of the 16th *November* last\*, injoining *Morgan* from receiving any part of the rents and profits arising from the plaintiff's estates, and in the publication by *Morgan* of a printed document, purporting to be a report of the judgment of one of the Barons†: and also that *Lewis* should be ordered to pay into Court 300*l.* the money so received by him since the order had been pronounced.

[On making the motion, a question arose whether such an order, if granted, should be absolute in the first instance, or to shew cause; and the Court ruled that it ought to be the latter.]

The affidavit on which the rule was granted, stated the facts noticed in the order—that the tenants had been served with notice of the injunction

\* *Vide ante*, p. 150.

† *Vide Read v. Huggonson*, 2 Atk. 469. — and *Baker v. Hart*, 3 Ib. 542.

Woon, Baron, dissentiente, considering the notice insufficient in this case, at least as to the agent.

The application should be for a rule to shew cause.

One of the Court dissenting from an order for an injunction, and notice of an appeal from the decision having been given, are no excuse for disobeying the order.

junction—and that *Lewis* had acknowledged having seen *that* notice. On the other hand, the affidavit of *Lewis* stated that the order for an injunction had not been served on *Morgan* or *Lewis*, till after the latter had received the 300*l.* from the tenants—that he was merely the agent of *Morgan*—and that he had not received any of the rents and profits since he was served with notice.

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It was therefore submitted by *Jervis*, that in a case like the present, where the Court had not been unanimous in making the order of the 18th *November*, and where notice of appeal had been given, connected with the facts, that *Lewis* was merely an agent, and resided in the country, and that he had not received any thing after service of the order—the defendants had not been guilty of a contempt, and more particularly *Lewis*, who could in no respect be considered as bound by the injunction, of which he had had no notice.

In support of the rule, it was urged by the *Solicitor General* and *Blake*, that *Morgan* having been in Court when the judgment was about to be pronounced—and his having himself published the judgment of one of the Court—a correct account being at the time inserted in all the *London* papers, and the *Carmarthen Herald*—and both defendants being *practising attornies*, this case was in all respects much stronger than those (a) in

(a) *Skip v. Harwood*, 3 Atk. Ves. 136. — and *Kimpton v. 565.*—*Osborne v. Tennant*, 14 Eve, 2 Ves. & Bea. 349.

which

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which it had been decided that a party having knowledge by any means of an injunction, was enough to bring him into contempt for breach of it, although the order had not been served.

GRAHAM, *Baron*, declared his opinion to be, that the rule ought to be made absolute; for that under the circumstances of this case, and particularly where the parties were professional persons, there could be no pretence for disobeying the order of the Court, either on the ground of want of knowledge of its having issued, or of ignorance of the legal consequences—and that the parties' means of notice was amply sufficient to bind them.

WOOD, *Baron*, (admitting that if legal notice could be brought home to the parties, it would be sufficient to bring them into contempt, and that one Judge dissenting from the order pronounced, and notice of appeal having been given, was no excuse for disobedience of it), was yet of opinion, that in the present case the want of regular service of the notice was not supplied as to *Lewis*, for the utmost length that any case had hitherto gone, was where the party enjoined had been actually in Court. I agree (said his Lordship) that in a case like that of *Osborne v. Tennant*, there might be a breach of the injunction, but this will be the first instance of a person in the situation of *Lewis* having been held to be guilty of a contempt: and notwithstanding it is of high importance to the administration of justice,

justice, that obedience to the orders of Courts should be rigorously enforced, it is of equal importance that the subject, if punished, should be first clearly shewn to be deserving of it. A newspaper account is not such a notice of the proceedings of a Court as should bring a party into contempt.

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GARROW, *Baron*, concurred with GRAHAM, *Baron*, in the opinion that a sufficient knowledge had been proved to have reached the parties, to bring them into contempt, or otherwise the orders of the Court might easily be eluded, and persons enjoined might *procure* a breach of an injunction to be committed with impunity, if such shallow pretences as these could be set up against similar applications to the present.

Order absolute,

With the Costs of this application.

MACMURDO

1818.

Thursday,  
12th February.

MACMURDO v. BIRCH, MACKAY, and LAUGHTON.

RADCLIFFE and another v. Same.

A plaintiff having arrested two of partners on a *quo minus*, and proceeded against an absent third by *ven. fac. ad resp.* under which issues, and increased issues, had been levied on the partnership goods—the Court refused, on cause shewn against a rule for that purpose, to set aside the proceedings, and order the money levied to be restored, and the effects to be delivered up, although it was sworn, on the part of the absent defendant, that he was absent on his business of mariner, and not for the purpose of avoiding proceedings.

N.—Such a rule discharged *with costs*.

*DAUNCEY* and *Littledale* now shewed cause against two orders, which had been obtained on a former day, for setting aside the writs of *venire facias ad respondendum* which had been issued in these causes, and all the proceedings had thereon, for irregularity, with costs—and for restoration to the defendants of possession of goods distrained, and money levied, &c.

The affidavits of *Birch* and *Mackay*, two of the defendants, (who were all partners in trade at *Liverpool*,) on which the rule was founded, stated in substance, that the deponent being arrested in these actions\*, had put in special bail—that the defendant *Laughton* being at that time on a voyage at sea, writs of *venire facias* and *distringas* thereon were issued against *Laughton*, and executed on the joint goods of the defendants; and that the deponent had paid the common issues, but the sheriff was in possession of the partnership property, under the subsequent *distringas* for increased issues†.

The

\* Those defendants were proceeded against by *quo minus*.

† The first action was brought to recover 346*l.* 4*s.* and on that issues were levied specially, after the common issues, to the amount (on the *alias*) of 100*l.* and on the *pluries* 190*l.* 18*s.* 10*d.*

T<sup>h</sup>.

The affidavit also stated, that *Laughton* was master of a merchant vessel belonging to the port of *Liverpool*, and was absent in his business, and not for the purpose of avoiding this action, or any legal proceedings—that he was a resident housekeeper in *Liverpool*—that his vessel had been advertized to sail for several weeks before she proceeded on her voyage—and that he left the entire management of the partnership business to the deponents.

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The affidavits filed in opposition to the rule stated, that the defendant *Laughton* had been regularly served with the usual warrant or summons on the writs, by delivering copies to the defendants, *Birch* and *Mackay*, at the counting-house, (*Laughton* being then out of the realm,)—and that for default of his appearance, *distringas* had been issued, and common and increased issues levied, in the usual course.

For the defendants it was contended, that the facts disclosed in their affidavit shewed, that this was not a case wherein a *distringas* was authorized, in consequence of the absence of the defendant *Laughton*—that the necessary allegation (that the

The second action was for 176*l.* 10*s.* 1*d.* After levying the common issues, an *alias distringas* was obtained for 50*l.* and a *pluries* for 124*l.* 19*s.* 1*d.*, which were levied on the partnership goods.

The amount of those levies are particularly stated, because, as they are discretionary in the Court, such instances afford *criteria* for regulating similar applications.

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 and others.

the defendant kept out of the way to avoid process) could not be truly made \*—and that the service was not sufficient.

On the other hand it was insisted, that as this was a case of partnership, where two of the partners had been duly proceeded against, and had appeared, the proceeding against the absent partner had been strictly regular.

The Court adopting that distinction,

Discharged the rule,

With Costs †.

\* *Cawlin v. Sir R. Lawley*,  
 ante, vol. ii. p. 12.

† Vide *Nicholson and another v. Boicnass and Hall*,  
 ante, vol. iii. p. 263.

THE END OF HILARY TERM.

**REPORTS**  
 OF  
**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**COURT OF EXCHEQUER,**  
 AND  
**EXCHEQUER CHAMBER.**

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**EASTER TERM,**  
**58 GEO. III.**


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**GUPPY v. BRITTLEBANK and POTTER.**

**COPLEY**, Serjt. moved for a rule to shew cause why there should not be a new trial in this case, which was an action of trespass for an assault and false imprisonment.

It appeared in evidence, that the plaintiff

for which he is afterwards apprehended by private persons, without warrant, on his way home, and carried before a magistrate for examination, by whom he is immediately discharged, cannot maintain an action for false imprisonment against those who so apprehended him under such circumstances. And those circumstances may be pleaded in justification, and, if proved, will entitle the defendant to a verdict: at least, the Court will not grant a new trial where the jury have been so directed, although the defendant had also pleaded the general issue.

**VOL. V.**

**M M**

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1818.

*Monday,*  
*15th April.*

A person of decent repute, while attending a fair at a town in which he was a stranger, in the way of his business as a horse-dealer, having unknowingly uttered a forged note,

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v.  
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(who was a man of character), was a horse-dealer residing in the county of *Somerset*. Being at *Ashborne* (*Derby*) fair, in the way of his business, he paid a person of the name of *Mellor* a *1l.* note, amongst others, in purchase of a colt. *Mellor* took it to the defendant *Brittlebank's* banking-house, where, being discovered to be a forgery, it was returned to him, and he took it again to the plaintiff, and received from him another in exchange for it. The defendant *Brittlebank* then sent the defendant *Potter*, and another person, (neither of whom were constables), in pursuit of the plaintiff, who overtook him about four miles from *Ashborne*, returning home with the colts which he had purchased at the fair. They told him that they apprehended him, (*having no warrant or other authority from a magistrate*) on a charge of uttering forged notes, and brought him back to the town of *Ashborne*, where he was taken before a magistrate, by whom he was discharged, after having been put to very considerable inconvenience and expence.

The defendant *Brittlebank* pleaded the general issue, and a justification, ' that before and at, &c. a certain fair was holden at *Ashborne*, and divers false, forged, and counterfeit notes, purporting, &c. had been there tendered and offered in payment—and that afterwards, &c. the plaintiff did utter and pay to one *Thomas Mellor*, a certain false, forged, and counterfeit note, purporting, &c. wherefore said *Brittlebank* had good and probable

probable cause to suspect, and did suspect, plaintiff to have feloniously, and against the form, &c. uttered the said note, well knowing the same at the time to be false, forged, and counterfeit: and thereupon, having such probable cause and ground of suspicion, in order to arrest the plaintiff, and for the purpose of carrying him before a magistrate, he did &c. (admitting the facts charged in the declaration).’ — Averment, ‘that on searching the plaintiff, a certain other forged note was found on him.’ Replication to second plea, ‘that defendant, of his own wrong, and without such cause, &c. committed the said trespasses.’


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The other defendant had suffered judgment by default.

The case being proved, Mr. *Baron Garrow* directed the jury, that although the plaintiff was a man of character, yet where there was well founded suspicion, every man was a constable, and might act as the defendant had done, if *bonâ fide* — and that if the jury thought that he had so acted, they would acquit the defendant on the record, and give the smallest damages against the other. The jury gave their verdict accordingly.

It was now submitted by the counsel for the plaintiff, that although the facts stated in the justification were true, excepting the guilty knowledge: yet as there had been no information laid before a magistrate, and no warrant obtained to authorize the apprehension of the plaintiff,—and

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as the evidence which had been given in support of the justification was not, without proof of the *scienter*, sufficient to establish a charge of felony, the plea of justification had failed, admitting the other facts to have been proved. And it was contended, that the broad distinction of the cases wherein a man might apprehend another without warrant, from those wherein he could not, was, that a felony must have been committed; whereas, in the present case, there was no pretence for imputing to the plaintiff that he knew the note to be forged, and the consequence was, that he was immediately discharged: but

The Court were of opinion, that, considering all the circumstances alleged in the justification under which the apprehension and detention took place, there had been, in the present instance, sufficient matter of presumption of the plaintiff's guilt, to authorize the defendant to assume, for the purpose of apprehending the plaintiff, the authority of constable; and that therefore the arrest, although without warrant, had been so far justified, as that they ought not to disturb the verdict.

*Per Curiam.*

Rule refused.

IN

## IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

JAMES v. EMERY and CLUDDE.

3 B. &amp; C. 722.

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1818.

Wednesday,  
15th April.

THE defendants (plaintiffs below) had brought an action for a breach of covenant against the plaintiff in error, on certain articles of agreement entered into between one *Rowley*, and *Emery* and *Cludde* the defendants in error, of the one part, and *James* (plaintiff in error) and *Stubbs* (since deceased) of the other part.

The criterion by which the propriety of the joinder, or non-joinder of parties to a covenant, in an action for breaches is to be ascertained, is the nature of the interest of the covenantees.

The declaration stated, that, by the agreement, [after reciting that the said *Rowley*, *Emery*, and *Cludde*, together with one *Sarah Dunning*, were entitled to the entirety of the premises, &c. in the following proportions—*Benjamin Rowley* to five undivided parts thereof, and one moiety of another twelfth part, *Emery* and *Cludde* in the same proportions, and *Sarah Dunning* to the remaining twelfth part: subject to the payment to *Rowley*, *Emery*, and *Cludde*, of 400*l.* (a moiety to *Rowley*, and a moiety to *Emery* and *Cludde*,)] the said '*Rowley*, *Emery*, and *Cludde*, did thereby for themselves severally, and not jointly, and for their several, respective and not joint heirs, executors

If the interest be several, the action may be several, if joint, it must be joint, and the terms, or language of the covenant, do not controul that principle.

Interest allowed on affirming judgment in an action on breach of covenant, for non-payment of an instalment of the purchase-money, although there be an express engagement that interest shall be paid only on one instalment.

M M 3

and


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*and administrators, covenant with said James and Stubbs, and each of them, their, and each of their executors, &c. that they, the said Benjamin Rowley, Emery, and Cludde, should and would, within the space of two calendar months from the date thereof, make out and deliver to the said James and Stubbs an abstract of the title of them, the said Rowley, Emery, and Cludde, to eleven undivided twelfth parts of and in &c. and within three months, 'in conjunction with all other parties in anywise interested therein, would grant, release, and convey &c. unto and to the use of James and Stubbs, as tenants in common, the said eleven parts &c. and all &c. &c. And that it should be lawful for the said James and Stubbs to enter forthwith for making erections, alterations, &c. 'without being considered by, or being amenable to the said Benjamin Rowley, Emery, and Cludde, as trespassers for so doing. In consideration whereof the said James and Stubbs did thereby for themselves, and their respective heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said Benjamin Rowley, Emery, and Cludde, and each of them, their, and each, &c. that they, &c. would pay (in the proportions of one moiety to Rowley, his executors, &c. and the other to Emery and Cludde, their executors, &c.) the sum of 14,000*l.* by the following instalments — 2000*l.* 25th December, 1813, with interest to be computed from the 25th December then last — 2000*l.* on the 25th December then next, and 2000*l.* on every succeeding 25th December, until the whole &c. &c. should be*

paid,

paid, but *without demanding or requiring any interest* for any, or either of such payments, to be made after the said 25th December, 1813; and should make and execute to the said *Rowley, Emery, and Cludde*, and their heirs &c. such a security upon the said estate &c. by way of mortgage, for payment of the said several instalments, as they *Rowley, Emery, and Cludde*, or their counsel, should direct; and, as a collateral security, should make and give the joint and separate bond of them the said *James and Stubbs*, in a proper penalty: the expense of making title to be borne by *Rowley, Emery, and Cludde*, according to their several estates and interest in, &c.—Averment of performance, and readiness to perform the agreement on the part of the plaintiffs, (below) and that defendants took possession.—Breach refusal to accept conveyance, and to pay such part of the purchase-money as had become due.

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 v.  
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 and CLUDDE.

The defendant pleaded *actio non*; for that the said *Benjamin Rowley* was still living.

General demurrer and joinder. — Judgment for plaintiffs (below) for 3100*l.* and 38*l.* costs. — General errors assigned.

*Gaselee*, in support of the assignment of errors, submitted, that the questions raised by the pleadings were, whether the covenant of *Rowley* and the two defendants in error, with the plaintiff, was not a joint covenant—and whether *Benjamin Rowley* ought not to have been made a party to this action. And he contended that the covenant was joint,

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JAMES  
&  
EMERY  
and CLUDDE.

and that *Rowley* should have been a party to the suit. Anticipating that it would be urged, that the interest of the vendors was separate, he insisted that the covenant, as to the purchasers at least, was joint: they covenanted to pay the purchase-money by instalments — they also covenanted to execute a mortgage — and to give a bond for securing the purchase-money; therefore if the covenants should be held to be separate, the plaintiff in error would be liable to separate actions, at the suit of each of the defendants, for not paying the money — for not executing the mortgage — and for not giving the bond: the legal interest in which three several branches of the covenant was joint in the covenantees: — That in this case the distinction of joint and separate covenants more particularly applied, because the difference was carefully observed in the framing of the covenants; for where the covenant was meant to be joint, and where several, it was expressly made so by the terms of the agreement: — That the covenant by *James* and *Stubbs* was clearly joint, being made to and with the three persons, the two defendants in error, and the other person, which latter ought therefore to have been a party to this suit: — and that there was nothing in the words, ‘*and with each of them,*’ that could make that a separate covenant, which was, in effect, substantially joint. — That it was so decided in *Anderson v. Martindale* (a), and the cases there cited, where it was held, that the plaintiff alone could not maintain an action on a joint and several covenant, where another had a legal

(a) 1 East, 497.

interest in the performance of it, notwithstanding the covenant, was '*cum quolibet et quolibet eorum*.'

—That this case was still stronger, because two of the things to be performed are, in their nature, joint—the mortgage to be executed on the premises sold, and the bond to be given to the three parties interested—And that in the case of *Southcote, executrix, &c. v. Hoare (b)*, the same doctrine was recognized and acted upon in a very strong instance, for there the covenant was so far not joint, as that the party said to be necessarily required to be joined with the plaintiff, was not named with him in the covenant, but was a separate party.

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v.  
EMERY  
and CLUDGE.

*Puller*, who was to have sustained the pleadings on the record, was stopped by

GIBBS, C. J. who (having stated the case and the question) observed: The principle on which this case must be determined is perfectly well known and established\*. Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint: and where the interest is joint, the action must be joint, although the covenant in language, purport to be joint and several.

12th Nov  
1813

In this case the *interest* is most clearly several. [His Lordship read the appropriate passages of the covenants]. The plaintiffs below, who brought

(b) 3 Taunt. 87.

\* Vide *Eccleston and Wife, Executors, &c. v. Clipsham*, 1 Saund. 253.

this

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and CLUNDE.

this action, were entitled to undivided proportions of the property sold, and of the purchase-money, which was the consideration, and that independently of the interest of *Rowley*: and the covenant must follow the interest of the covenantees. If the whole deed be read, it amounts, in effect, to this, that one party sells one moiety of the property, and the other another, and one-half of the purchase-money is accordingly to be paid to one of the vendors, and the other half to the other, and that was the plain understanding of the parties.

But it is said, that there are other covenants which are expressly joint, and therefore the action founded on those should be joint too; but I do not think that that by any means follows, for the covenants must be construed according to their legal effect.

As to the cases which have been cited, there is this plain distinction to be noticed, which takes them out of the operation of the rule, and leaves this case within it. In none of those cases had the person, who, it was contended, was a necessary party, any beneficial interest whatever. In some of them they who framed the deeds had provided that one of the covenantees should have a sort of guardian over him in the person of the other, and there could not be any separation of the interest in such a case as that, so that it became absolutely necessary that such third person should join in any action on the covenant, for he could only have been made a party for that purpose.

The

The true test is, whether the *interest* be joint or several : for in whatever terms the covenant be framed, it must follow the nature of the interest, and in this case I think the interest was several. Therefore we pronounce the

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 JAMES  
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 EMERY  
 and CLUDDEN.

Judgment affirmed.

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*Puller* then applied, that interest might be added, from the time of the allowance, on the whole sum recovered, although it was larger than that on which interest had been agreed to be paid : but

*Gaselee* submitted, that the agreement being express, the defendants in error were only entitled to interest on the first instalment, which was the stipulation between the parties, *in terms* : and he compared this bargain to that of goods sold to be paid for at a particular day which had been long past.

GIBBS, C. J. If there have been any case in this Court ruling otherwise, we will attend to it. *On principle* we have no difficulty. If the instalment had been paid at the appointed time, there would have been no interest recoverable.

Interest allowed on the sum  
 recovered from the day of  
 judgment.

IN

## IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

1818.

Wednesday,  
15th April.

IKIN v. BRADLEY.

On a judgment recovered against bankers, for a balance due from them, of money deposited in their bank by a customer, the Court will, on affirmation, order the interest to be added to the damages, where the custom of the bank is to allow it.

But they will make the order for interest, after the same rate only at which it was the usage of the bank to allow it to their customers.

**LITTLEDALE** moved for interest, on the affirmation of this judgment, on an affidavit, stating, that the action was commenced for the recovery of the balance due to the defendant in error, on account of money deposited in a bank, of the firm of which, the plaintiff in error was surviving partner, *Hammel v. Abel (a)*; and that it was the usage of the bank, to allow their customers interest on money so deposited with them. *Gwynn v. Godby (b)*.

It being the custom of the bank, to allow such interest after the rate of *4l. per cent., per annum*, the Court ordered the interest to be calculated at *that rate*.

(a) 4 Tannt. 298.

(b) 4 Tannt. 348.

## CORTON v. HORNER.

1818.

17th April.

**DAUNCEY** and *Hone* moved for an injunction on the filing of this bill, which was supported by the usual affidavit of the truth of the allegations.

The bill stated that the plaintiff and defendant became and continued to be co-partners until the 3d of July 1817, when the partnership was dissolved by mutual consent, and notice thereof, signed by them respectively, inserted in the *London Gazette*—that on entering into partnership, they had agreed that a piece of ground belonging to the plaintiff, and on which he had built, should form part of the partnership property—that the partnership accounts had not been closed—that on the treaty for the dissolution, and at the time of signing the notice for advertisement, it was agreed between the plaintiff and defendant that the accounts should be forthwith settled, and that the defendant should immediately afterwards pay to the plaintiff half the value of the co-partnership stock, property and effects, and that upon such payment being made, the whole thereof should become the property of the defendant—that, confiding in such agreement, the plaintiff consented to the dissolution—that the plaintiff had since applied to the defendant for a settlement of the accounts, and payment of half the value of

The plaintiff and defendant (partners) having agreed to dissolve partnership, and that defendant, on payment of half the value of the effects, should take the whole—the defendant took possession of the improved property, but failed to make payment, and had begun to pull down part of the buildings—held that it was not waste: and an injunction to restrain him from so doing refused.

1818.  
COTTON  
v.  
HORNBY.

of the effects, according to the agreement, which he had refused — that the defendant had taken possession of the ground and buildings, and all other the partnership property, with the books of account, and was carrying on the trade, for his own private account, with the plaintiff's moiety of the stock, and had begun to pull down part of the buildings. The bill therefore prayed an account of the partnership transactions, and payment by the defendant to the plaintiff of a moiety of the value of the stock, premises, debts, property, and effects, and *that the plaintiff might be declared to have a lien upon the whole of the partnership property for such moiety, and that until payment thereof, the defendant might be restrained from collecting the debts, and particularly from pulling down the buildings, and converting the materials to his use, or committing waste upon the co-partnership premises.*

*Per Curiam.*

The plaintiff has not by his bill made out a case of waste, whatever he may do hereafter, if the defendant by his answer admit his equity. The defendant may have failed to perform the agreement on his part, but that is not sufficient to entitle the plaintiff to the remedy he seeks for by the present motion; for it was agreed, that on payment by the defendant of the value of his share in the partnership effects, the whole of the property should belong to him. The  
plaintiff

plaintiff can only have an account of the partnership dealings for the purpose of ascertaining what is due to him under the agreement for a dissolution.

1818.  
COSTON  
v.  
HARRIS.

It is a great mistake, and one very commonly made, to imagine that all the numerous cases, wherein very much inconvenience, and even loss may be suffered by consequence of the acts sought to be restrained, are *therefore* in the nature of waste.

Injunction refused.

1818.

12th April.

GADD v. BENNETT.

The declaration in an action for maliciously causing a writ to be sued out, whereon plaintiff was imprisoned, stating the process with the *ac etiam* clause, as sued out for 50*l.* (instead of 30*l.* according to the fact,) and an endorsement for 15*l.* the warrant being for 30*l.* it is a *fatal variance*.

An averment, that the defendant had voluntarily permitted his bill to be discontinued, for want of prosecution thereof, with a conclusion to the record, is not proved by shewing that there had been actually a rule to discontinue, regularly taken out: the record having been averred, it must be proved.

Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs.

**THIS** was an action for a malicious arrest and imprisonment.

The declaration stated that the defendant sued out a bill of *Middlesex* against the plaintiff, whereby the sheriff was commanded to take the plaintiff, &c. to answer the defendant of a plea of trespass, and also to a bill of the said defendant against the said plaintiff, for 50*l.* upon promises, according, &c. averring that said defendant, contriving, &c. falsely and maliciously caused the said writ to be endorsed for bail for 15*l.* and upwards, and thereupon caused the plaintiff to be arrested, and imprisoned, and detained, &c. for seventeen days, and that defendant had no probable cause of action to the amount of 15*l.*;—that proceedings were thereupon had in the said suit; and that afterwards, &c. the defendant did not prosecute his said bill against the said plaintiff with effect, but voluntarily permitted his said bill to be discontinued for want of prosecution thereof; and thereupon it was then and there considered by the said Court that the said defendant should take nothing by his bill, as by the record and proceeding thereon, still remaining, &c. appeared, whereupon and whereby the said suit then and there became and was wholly ended and determined.

The

The cause was tried before the Lord Chief Baron, at the Sittings in *Easter Term* last, when a verdict was found for the plaintiff. Two objections were made in the course of the trial, 1st, that the declaration was not supported by the evidence, as it had, in setting forth the *assumpsit* part of the bill of *Middlesex*, shewn that it was for 50*l.* upon promises, whereas, in fact, it was for 30*l.* and the warrant was accordingly made out for 30*l.* And 2dly, that the averment of the discontinuance of the suit was also not borne out by the evidence, as it had been only proved that there had been a rule to discontinue, on payment of costs, but the record was not produced, to shew that the suit had been actually discontinued. It was ordered that the cause should proceed with liberty to move.

A rule was afterwards obtained by the defendant to shew cause why the verdict should not be set aside, and a nonsuit entered on the above grounds.

**RICHARDS, Lord Chief Baron**, having reported,

**Dunlop**, and **Sir William Owen**, both shewed cause, contending, as to the first ground of objection, that the variance in respect of the sum for which the process was stated to have been sued out, and the endorsement on the warrant, was merely an obvious clerical misprision in an immaterial part of the averment, (*Peppin v. Solomon*)

1818.

GADD  
v.  
BENNETT.

*lmons (a),*) and did not affect the real merits, and that as the complaint was supported by the previous allegations in the declaration, which were clearly proved, all that related to setting forth and reciting the *ac etiam* part of the writ might be rejected as surplusage, and then the *gravamen* of the plaintiff's cause of action would have been fully supported by the evidence.

On the second point, they contended, that as the discontinuance was in fact proved, and the payment of the costs, the averment was supported, *Bristow v. Haywood (b)*, and that in that averment also, all that followed the statement of the fact, and referred to the record, might be rejected as surplusage, for that that likewise was immaterial, inasmuch as it was not necessary to this action, that the discontinuance should have been recorded, provided it was made out, by any evidence, to the satisfaction of the jury, as it was a mere matter of fact, relating to a voluntary act on the part of the defendant;—*Walker v. Walker (c)*, *Wigley v. Jones (d)*.

[The Court remarked, that in those cases the reference had been to a record which could not exist, and suggested, that here there might or ought to have been a record.]

It was then put that the determination of the

(a) 5 T. R. 496.

(b) 4 Campb. N. P. 214.

(c) 1 Doug. 1.

(d) 5 East, 440.

but was not in practice required to be shewn, as appeared by the precedents, (referring to *Chitty*, 2 vol. p. 245, and the authorities there mentioned,) but

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F. BENNETT.

[Wood, *Baron*, denied that.]

Then adverting more particularly to the *terms* of the declaration, with reference to the *nature* of the action, and the *proofs* necessary to support it, they insisted that the formal objections now taken were not founded either on principle or authority.

*Clarke*, in support of the rule, relied, as to both objections, on the axiom of law *allegata probanda* applying to all material averments. The first averment he submitted was material, because it is the *ac etiam* part of the process which gives the Court jurisdiction. Variances less material have been held fatal, as in *Green v. Rennett* (e), and it had been urged strongly in that case also that the variance did not go to the gist of the action. So also in *Wyvill v. Shepherd* (f).

In support of the second objection, he contended, that although perhaps in the averment they need not have concluded to the record, yet having done so, they were bound to produce it, and to have shewn, as they had alleged, that judgment had been in fact signed for want of

(e) 1 T. R. 656.

(f) 1 H. Bl. 162.

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v.

BENNETT.

prosecution. Two of the cases cited on the point of rejecting that conclusion as surplusage, having been already distinguished by the Court from this case, he produced the declaration in the case of *Bristow v. Haywood*, which averred only that 'The suit was ended and determined.' He denied that it had been proved that the costs had been paid, (and that was sanctioned by the Lord Chief Baron from his Lordship's notes,) and therefore he submitted that the rule ought to be made absolute.

RICHARDS, *Chief Baron*, (having stated the first objection.) It was certainly necessary to state the writ, and therefore it was not matter of surplusage, and the plaintiff in stating it was bound to state it accurately. He has clearly not done so, (adverting to the record.) There is therefore a material variance, and one of too great importance to be got over.

As to the other objection of the averment of the discontinuance not having been proved as laid, that I think is also well founded. It is averred that the defendant discontinued, and then the averment goes on in the same sentence to state in what manner, shewing that it was by judgment of the Court. No other mode of discontinuance is averred but that, and that ~~has~~ certainly not been proved. It was said, that evidence to shew that the suit had been discontinued generally would be sufficient, but I think that the particular form of this averment precludes them;

them; and as to the fact of the payment of costs having been proved, I see no evidence of that on my notes. It was clearly necessary on this record to shew that judgment had been entered, for it is not stated as having been merely the act of the party, but of the Court. I therefore think that we should make this rule absolute.

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 GADD  
 v.  
 BENNETT.

GRAHAM, *Baron*. I had inclined to the opinion that the first objection of the variance in the process might have been got over, but I concur with my Lord Chief Baron.

The other objection cannot be got rid of, for it was important to shew that the defendant, having sued out a writ, had discontinued the suit; and if the allegation of that fact had been general, I should have considered that the evidence of an actual discontinuance, followed by payment of costs, would have been sufficient; but when so much more is particularly stated on the record, as here, it is made essential to the plaintiff's title, and cannot be rejected as surplusage. The averment is all one inseparable sentence, and we have no authority to mutilate it, or separate the *quo modo*, the whereupon, &c. from the preceding part.

Another insurmountable difficulty is, that the payment of costs was not proved, and if they had been really paid, the jury were not possessed of that fact.

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GADD  
v.  
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WOOD, *Baron*. I am of opinion, that both the objections taken to this declaration are fatal. It was necessary to set out the writ, although not perhaps with so much particularity as has been done; but they have done so, and therefore were bound by it. There is no doubt a very material variance, and therefore the plaintiff has failed.

Then as to the other point of the discontinuance not having proved as laid. Had the allegation been general, it would have been sufficient to have produced the rule, and proved payment of the costs, but he refers to the record, and there there is no judgment which there might have been: or a *nolle prosequi* might have been entered, which would have made the averment conformable.

GARROW, *Baron*, concurred on both points, and for the same reasons (which his Lordship stated)—adding that there was nothing conclusive in the mere rule to discontinue, which might have been merely conditional, and might never have been acted on; and that there was no evidence of the costs having been paid.

*Per Curiam.*

Make the

Rule absolute.

THOMAS

1818.

Saturday,  
18th April.

THOMAS v. PEARSE, Esq.

**THIS** was an action against the sheriff of *Essex*, for a false return of *nulla bona* to a writ of *fiery facias* on a judgment obtained by the plaintiff against *John Hulbert*, in an action of debt for 600*l.*

Competency  
of witness.

In an action against a sheriff for a false return of *nulla bona*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them—such person is admissible to prove that they were not the property of the debtor, against whom the execution had issued—because the sheriff cannot maintain an action against him (the witness) for the rescue, after having made such a return—and as to all other persons claiming the goods, the verdict would be *res inter alios acta*, and therefore could not be used to affect their rights in any proceeding against the witness.

It was tried at the sittings for *Middlesex*, in *Michaelmas* Term last, before the Lord Chief Baron and a special jury, who found a verdict for the plaintiff, damages 586*l.* 10*s.*

It was in evidence (though dubiously and under much confusion and contradiction) on the trial, that a person of the name of *Hudson* had taken a malting-house and premises of Mr. *Blyth*, as his tenant, at a rent of 200*l.* a-year; but *Hudson* owing at that time a debt to the Crown for duties, entered the premises at the Excise in the name of *Hulbert*, a person connected in a very vague manner with him in the business, and (as he stated) for the express purpose of protecting the property from the claim of the Crown. *Hudson* becoming indebted to *Blyth* for rent and in other respects, and a debt having become due to the Crown for duties, and an extent being expected momentarily, he, to secure *Blyth*, gave him an authority to take possession of the malt, &c. then on the premises. In the mean time, an officer of the sheriff of *Essex* seized the malt, and other effects, on an extent against *Hulbert*.

N N 4

Afterwards

1818. Afterwards, the same officer received a warrant from the sheriff, under an execution at the suit of the plaintiff against *Hulbert*, in consequence of which, *Blyth* gave notice to the officer, that the goods were not the property of *Hulbert*. The officer, however, took possession of them notwithstanding, under the extent, and also under the execution at the suit of the present plaintiff. *Blyth* however ultimately regained the possession, by taking them from the sheriff's officer by force, and sent them on board a vessel to *London*. The sheriff at first returned a rescue, but on being indemnified by other creditors of *Hudson*, amended his return to that of *nulla bona*, on which this action was brought.

The question in the cause, therefore, was, whether the goods were in fact the property of *Hulbert* or *Hudson*. And to prove certain facts within *Blyth's* knowledge, tending to shew that they were the goods of *Hudson*, the defendant's counsel proposed to call *Blyth*, who was objected to by the other side, on the ground of having an interest in the result, and his evidence was on that ground rejected by the Lord Chief Baron.

27th November.

*Campbell* obtained a rule nisi for a new trial on the ground that *Blyth's* evidence was improperly rejected, inasmuch as he had no interest in the verdict; for if the false return were made out against the sheriff, he could bring no action against *Blyth*, as he himself must have been proved to be a wrong-doer, which would preclude him.

him. That, he submitted, was established by the case of *Pitcher v. Bailey* (a); and he contended, besides, that the sheriff would be estopped by his own return of *nulla bona*. If, on the other hand, the verdict had been in favour of the defendant (the sheriff) the plaintiff might still have sued *Blyth*, because in that case the verdict could not be used in the witness's favour.

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 THOMAS  
 v.  
 PEARSE.

*Jervis, Taunton, and Chitty*, shewed cause. They contended, that *Blyth* was inadmissible as a witness, because he was directly interested in the event of the action; as the sheriff, in case of a verdict against him, would have an action against *Blyth* for taking away the goods while in his custody under process, although the return might have been false; for (they submitted) if the sheriff had acted under a mistake in permitting a person claiming a property in the goods, to take them out of his possession, he would undoubtedly have a right, on discovering that he had been imposed on, to bring an action against such person, to recover any damages which should be obtained against himself; and that, notwithstanding such a return as this, which, though false, might be made innocently, and without intention to do wrong. A sheriff cannot be considered as so estopped by his return as not to be afterwards permitted to give evidence of the truth, and avail himself of it in a court of law. And the record of the verdict in

(a) 8 East, 171.

1818.  
 THOMAS  
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an action against him for the false return, would be evidence as to the *quantum* of the damages sustained by him, in consequence of the deceit practised on him by the party, though not to prove the fact of the deception. Nor would it be necessary for the sheriff, in such an action, to shew that these were the goods of *Hulbert*, for having taken them by virtue of the writ, he would have such a qualified property in them as would enable him to maintain trespass or trover in his own name, against any person who should take them from him, as was determined in *Wilbraham v. Snow (b)*, and that without shewing any better right.

The question whether the verdict could be used in any other action wherein the witness should be a party, (they insisted) was not the only criterion of his admissibility, for although that should not be so, yet if the witness had a direct interest in the result of the suit, it would be a sufficient ground for rejecting his testimony. In the case of *Bland v. Ansley (c)*, which was an action of trespass against the sheriff for taking the goods of the plaintiff, under an execution against a third person, that third person was held not to be a competent witness for the defendant, to prove that he had not sold the goods to the plaintiff, and that they were his property, though in that case the record could not have been used in evidence. So, in the case of an issue directed to try the fact of

(b) 2 Saund. 47.

(c) 2 N. R. 331.

AN act of bankruptcy, it is an inflexible rule of law, that the bankrupt himself cannot be examined. In *Keightley v. Birch* (d), a landlord to whom a sheriff had paid money for rent in arrear, was held, by Lord *Ellenborough*, not to be admissible to prove that the rent was in arrear. On that occasion, Lord *Ellenborough* observed, 'sheriffs are often placed in very difficult circumstances, and must act at their peril.' In this case *Blyth* had a direct interest to prove the property to be in *Hudson*, and justify the sheriff's return; for if the present verdict should stand, the sheriff will have an action against *Blyth*, in consequence of the goods having been rescued; whereas, if they were not *Hulbert's* goods, the sheriff would have no cause of action against *Blyth*.

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 THOMAS  
 P.  
 PEARSE,

In the case of *Green v. The New River Company* (e), it was held, that a servant could not be called as a witness in an action brought against his master, for the consequence of his own negligence, because the verdict, in that case, might be afterwards used in evidence against the servant, in an action brought by the master. So, in this case, the verdict might be used in an action against *Blyth*, for that verdict would be the foundation of the sheriff's action against him, and might be used, as there, to shew the *quantum* of damages recovered; and that is a case directly in point with the present. Even

(d) 3 Camp. N. P. 523.

(e) 4 T. R. 589.

where

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where a witness does not stand indifferently between two parties, and is liable to both, if he be more extensively liable to one than the other, that is sufficient to render him an incompetent witness for the former. *Jones v. Brooke* (f). And where a verdict might be used to influence a jury in a civil case, it has been held to render a witness incompetent to give evidence which would conduce to such a verdict on a criminal prosecution. *Rea v. Whiting* (g).

*Dauncey and Campbell*, in support of the rule, contended, that the principle of all the cases of incompetency of witnesses was, that their legal situation must be altered by the verdict: they must either be shewn to acquire some right, or incur some liability which did not exist before. The verdict in this action, if the goods were found not to be the property of *Hutbert*, would not conclude him, or any other person whose property they might be; for the owner, whoever he were, might maintain an action against *Blyth*, the next day, for the recovery of these goods, whosever property they might have been found to be by the verdict in this action, which, as to all the world besides, would be *res inter alios acta*, and therefore not evidence, as between any other plaintiff and the witness. As to the objection of the verdict being used to prejudice the jury on any other action, that went merely to

(f) 4 Taunt. 464.

(g) 1 Salk. 283.

his credit, not to his competency, the distinction between which had not been sufficiently attended to in argument, the case of *The King v. Whiting* having been long over-ruled, in *The King v. Bray* (h).

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Then the question is, whether the sheriff might have maintained any action against *Blyth*. Most clearly he could not; for he was estopped — not in the technical meaning of that word — but by his wrongful act in making a false return. The jury having found that these were the goods of *Hulbert*, and having given a verdict for the plaintiff, the sheriff has forfeited his right of action against *Blyth* by his false return, because it would be making *Blyth* amenable for his own offence. Although it is true that a sheriff may bring trover or trespass against a tort-feazor, where he is interrupted in his duty, yet he loses an otherwise just right of action by a breach of his duty (*Pitcher v. Bailey*). If, on the other hand, these were not the goods of *Hulbert*, the sheriff could have no right to them, nor to the possession under the writ, and therefore could not support any action against the person taking them. They cited the case in *Kernon*, of *Underwood v. Mardant* (i), where it was held, that in an action against the sheriff for a false return of *nulla bona*, if the plaintiff recover damages against him, the verdict does not, as in the com-

(h) Ca. Temp. Hardw. 358.

(i) 2 Vern. 237.

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mon case of trover, vest the property of the goods in the sheriff, but they remain in the party, and are liable to any other execution. The sheriff, therefore, could have no right in such a case, to bring an action to recover the goods against the person in possession of them. And he could not recover damages in an action founded on his own wrong, for there would be no one to whom he would be to pay them over, and it would be absurd that he should put the amount into his own pocket.

As to the case of *Green v. The New River Company*, there is a privity between master and servant, which does not exist in this case between the sheriff and *Blyth*, and that distinguishes the cases. There the allegation in the master's declaration would require the production of the record, but here there could be no allegation framed which would entitle the sheriff to use this verdict.

RICHARDS, *Chief Baron*, (stopping further argument on the part of the defendant.) The sheriff has returned *nulla bona*, after having seized these goods, which the plaintiff in the present action insists were the goods of *Hulbert*. If they were, it is a false return, and being his own wrongful act so to return the writ, what remedy can he have against the taker of those goods? He had no interest in them after that return, whereby he declares that he never had rightful possession.

And

And the only question is, whether, under the circumstances of this case, he can maintain an action against *Blyth* for the rescue, for it was a rescue beyond all doubt, and he might have returned a rescue, but he chooses to return *nulla bona*. Can he then proceed against *Blyth* after that, and say, I returned what was not true in favour of *Blyth*, conducting myself improperly as a public officer, and therefore he is liable to pay me damages? There is no instance of such an action, and therefore there is no pretence for saying that this verdict could serve the sheriff in an action against *Blyth*, and as to all the world besides, it would be out of the question. I therefore think that the evidence ought to have been received.

GRAHAM, *Baron*. 'I have been much perplexed throughout this argument as to the opinion I should give; but I concur, at length, with my Lord Chief Baron. I certainly thought, at first, that *Blyth* had a direct interest in supporting the sheriff; but it is clearly not so, and unless he would be liable in an action by the sheriff, he is undoubtedly a competent witness: and it has been made quite manifest to my mind, that the sheriff could not maintain any action against him. The sheriff might have summoned a jury to ascertain in whom the property was, or he might have returned a rescue, or brought trespass or trover, but in fact he returns *nulla bona*, on the suggestion of *Blyth*, and on his own authority.

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thority he ventures to ratify *Blyth's* claim. The case is quite distinguishable from *Green v. The New River Company*. *Blyth*, when in Court, would be free from any apprehension of an action by the sheriff, and with respect to any other claimant of the goods, the verdict would not make any difference to *Blyth*, who would, after any verdict, be still precisely in the same situation. Whatever objection, therefore, there might be to his credibility, he is, I think, clearly admissible.

WOOD, *Baron*. I have, I confess, been for some time hesitating and doubting on this case; but I am now clearly of opinion that the witness was competent. The rule of law has been properly laid down, that the judgment must affect the witness in some way, to render him inadmissible; but whichever way it had been found in this instance, he could not have been affected by it. The main question is, whether he could have prevented the sheriff from maintaining any action against him. Before the sheriff had made his return of *nulla bona*, he might have had an action against *Blyth* for taking the goods, but he precluded himself by that return. How could he maintain trover contrary to that return, or trespass? He had thereby disclaimed all interest in the goods, and therefore it was impossible for him to maintain any action against the taker.

GARROW, *Baron*, concurred. The witness ought

ought to have been received; for in the situation in which he was placed, if the sheriff had no right of action against him, he was rather giving a right to all other persons, than depriving them of it. And with respect to the sheriff, there is no form of action, in which he could have sued *Byth*, under the circumstances of this case. I have felt all the difficulty of this very nice question, and certainly did not at first see the minute distinctions which have been pointed out between this case and the authorities which have been cited. There is certainly no privity between the defendant and the witness in this suit, nor could there be any action brought in which this record could be used; and that consideration removes the difficulty thrown in my way by the case of *Green v. The New River Company*. I therefore think there ought to be a new trial.

*Per Curiam.*

**Rule absolute.**

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21st April.

HOPKINS v. PEACOCK and another.

Where bail have been put in by a defendant, and not perfected, the sheriff's officer may put in and justify bail for his own indemnity.

It is no objection in this Court, that bail is put in by a different clerk in Court, without an order first obtained for leave to change the clerk in Court; or notice given of the change to the plaintiff, or his attorney.

As to the change of the attorney, (not being one of the four attorneys of this Court,) *semble*, the Court does not take notice of the immediate attorney in the cause, the proceedings being carried on in the Exchequer, wholly in the names of the clerks in Court.

SIR William Owen opposed the justification of the defendant's bail in this case, on the ground of their having been put in at the instance of the sheriff's officer, who had arrested the defendant;—that bail had been put in before, on the part of the defendant, but had not justified;—that the attorney and clerk in Court had been since charged without order of the Court, or notice to the plaintiff's attorney or clerk in Court, (in support of which point of objection, he referred to *Manning's Practice*, vol. i. p. 113, and the cases there cited (a).)—and that the costs of the attendance to oppose the former justification had not been deposited according to the practice.


The costs being deposited, and the other objections answered, by stating that the sheriff had put in bail for his own protection, and that the *dictum* in *Manning's Practice* was not founded on any decision of this Court, the cases there referred to being cases of a change of attorneys in the other Courts, and therefore not applicable to the clerks in Court of the Exchequer.

The Court decided that the bail being put in by the sheriff, (for his own protection) was no

(a) *Kaye v. De Mattos*, 2 Bl. 1323—and *Macpherson v. Borison*, 1 Doug. 217.

objection;

objection; but on the contrary, a natural and proper proceeding, and would alone have authorized a change of the attorney and clerk in Court, if in case of a defendant putting in other bail on his own behalf, such an objection were valid\*; but, with respect to that point they held it to be unfounded in practice in this Court, and in the reason of the thing; inasmuch as if unobjectionable bail were perfected, it was to the advantage of the defendants, whatever attorney should put them in: and they said, that in this Court the change of the clerk in Court by the party required neither order nor notice, where it did not affect the proceedings.

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[The officer, (being referred to) certified that it was not the practice in this Court that an order must be obtained for changing the clerk in Court in the cause.]

The bail were therefore permitted to justify.

\* As far as respects the attorney in the cause, (not being one of the four attorneys of the Exchequer,) it has been decided, that all notices given in this Court must be subscribed by, and addressed to clerks in Court—*Calvert v. Bowater*, ante, vol. i. p. 385. And in *Fisher v. Fielding*, ante, vol. i. p. 384, (a note to *Allison v. Noverre*,) the Court, on a question of privilege, considered that attorneys generally (not of this Court) were not necessarily recognized by the Court in proceedings on the plea side.

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Tuesday,  
21st April.METCALF v. BROWN and others, Assignees  
of WILSON a Bankrupt.

Demurrer.

A bill, praying repayment of money paid, in consideration of an assignment of a lease, with a clause, that the vendor may be at liberty to re-purchase within a given time, by paying a larger sum, which would amount to much more than the legal interest of the money paid for the intermediate time; or that in default thereof the vendor might be barred and foreclosed of such right to re-purchase — and stating the above facts not demurable, on the ground of usury, apparent on the face of the bill.

A general demurrer to a part of a bill is bad pleading.

THE bill stated that *Wilson*, a builder, having occasion to borrow money, agreed with one *Bromley*, an auctioneer, to assign a certain lease, and carcasses of houses thereon, to secure the repayment — that *Bromley* refused to lend, but agreed to purchase for 800*l.*, for the purpose of selling the premises by auction, for the sake of the auctioneer's profits — that *Wilson* then (15th April 1811) assigned, &c. — that *Wilson* afterwards proposed to the plaintiff to purchase the premises for 1,300*l.*, out of which *Bromley* was to be paid the 800*l.* and 80*l.*, in lieu of the profits which *Bromley* as auctioneer would have made on an actual sale, to which the plaintiff acceded, and *Bromley* was privy to such agreement — that in pursuance thereof, the plaintiff paid to *Wilson* 150*l.*, as a deposit in part of the said 1,300*l.* — that *Wilson*, at that time, conceiving the said carcasses of houses would be worth much more when finished, stipulated that he might be at liberty to repurchase, proposing, in order to indemnify the plaintiff from any loss which he might sustain, on account of the then state of the houses, to pay him 1,400*l.* for such re-purchase before the following 29th September, in consideration of which, the plaintiff agreed to permit *Wilson* so to re-purchase,

re-purchase, &c. in case he should in the mean time be able to get more money by the sale — that a memorandum of agreement was accordingly made and signed between them to such effect on the 8th *June* 1811 — that on the 18th *June*, *Wilson* assigned said premises by indenture to plaintiff on the above conditions — that *Wilson* afterwards put up the premises twice for sale by public auction, and that each time they were bought in — that some time before *Christmas* 1811, plaintiff entered into possession of the premises, and the tenants attorned, and plaintiff received the rents and profits up to stated a time — that *Wilson* became bankrupt in *April* 1814, and defendants were appointed his assignees — that in *Hilary* 1815, they brought an ejectment against plaintiff in the King's Bench, to recover possession of said premises, on the ground of usury in the transaction, and 160*l.* for mesne profits, and recovered judgment, on which they obtained possession, and threatened to take out execution, unless, &c. — that the plaintiff had since recovered a verdict against the defendants, notwithstanding the defence of usury was attempted to be established — and that the plaintiff had offered to let the defendants redeem, on payment of the said 1,400*l.* and interest, and costs. Praying decree that that sum and all interest from the 29th *September*, and all his costs, might be paid to the plaintiff: and in default thereof, that the defendants might be utterly barred and foreclosed of and from all right, title, and equity, to re-purchase or otherwise redeem the premises, and that plaintiff might be

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quieted in the possession &c. — a release of the defendants' right and interest,—and for an injunction.

To that bill the defendants put in a demurrer: for that it appeared by plaintiff's own shewing, that the agreement to purchase for 1,300*l.* was in fact a contract for the taking indirectly for the loan &c. above 5*l. per cent. per annum*, contrary &c.—and that the indenture of the 18th June 1811 was void by the 12th *Anne*—and that the plaintiff had not by his bill made a case to entitle him to relief. — Whereupon, and for divers errors &c. defendant demurred, and demanded judgment, whether he ought to be compelled to make *any further or other* answer thereto, or to any part thereof.

*Dauncey* and *Sidebottom*, for the demurrer, having submitted that there was a manifest discrepancy between the statements and the prayer of the bill, contended, that the plaintiff was not in any way or in either character entitled to relief in equity on this bill: for that if he filed it as mortgagee, his mortgage treaty was palpably usurious. If on the other hand he were really a purchaser, he could obtain no relief as mortgagee: and they insisted that the pretended sale was merely colourable.

*Martin* and *Raithby*, *contra*, contended, that as neither loan, forbearance, security, or reciprocity of obligation appeared in the agreements, or  
on

on the face of the bill, there was no ground for the present demurrer. To sustain a demurrer by the rules of pleading, it should be quite obvious that there was a loan, and that its repayment was secured: and that the contract should be binding on both parties, and not optional on either side, and most especially that a transaction suggested to be colourable should be manifestly so, nothing of all which appears here.

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They then objected that in point of form this demurrer was untenable. It was a general demurrer, to a particular portion of the bill, admitting at the conclusion that the bill is entitled to some answer.

[RICHARDS, *Chief Baron*. — If you can shew that any part of the bill must be answered, then there is an end of the general demurrer.]

A demurrer is a proceeding subject to the utmost strictness, and cannot be sustained where the facts on which it is founded do not appear on the face of the bill.—*Edsell v. Buchanan (a)*.

*Per Curiam*.—

We have been considering of this demurrer during the argument, and we think that under all the circumstances disclosed, it ought to be overruled.

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A general demurrer cannot be put in on a particular part of the case.

Démurrer over-ruled.

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21st April.

KIDSON v. DILWORTH and WELCH.

Equity  
(affecting a bill  
of exchange.)

Where a solicitor—acting in getting in debts due to the estate of an intestate, under the authority of and as local agent to the administrator, another person being the immediate and general agent of the administrator, under whose directions the solicitor acts—has received money in the course of his agency, which

it is his duty, according to his instructions, to remit to the general agent;—if, in order to effect the object of remittance more conveniently, he procure a banker's bill for that purpose, which is accidentally drawn in his favour, so that it becomes necessary that he should indorse it, and he does so, a court of equity will restrain an action commenced against him on such indorsement, whether brought by the indorsee (the principal agent), or by a banker with whom the bill has been deposited, for the purposes of being presented for acceptance and payment by the drawee, although the banker may have given credit for the amount, if the latter can be shewn to have had any knowledge or information of the circumstances attending the transaction, and of the relative situation of the parties.

A further supplemental answer may be used to correct or explain an obvious mistake or ambiguity in the original answer, but not where the former is clear and intelligible without, or with a view to strengthen the defendant's case.

living at *Sunderland*, from persons residing in the neighbourhood of that place, in capacity of agent to the defendant *Welch*, and he (*Welch*) was himself the immediate agent and correspondent of *Robert Walker*, who was the administrator of the intestate, both of whom resided at or near *Lancaster*: and that such sums so received by the plaintiff were constantly remitted by him to *Welch*.

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In the course of that agency, the plaintiff received proposals from certain persons who were indebted to the estate, to whom he had applied for payment of a sum of 600*l.* due on their bond, to pay 300*l.* in part, and to give a bill at two months for the remainder.—The plaintiff communicated those proposals to *Welch* by letter, dated in *June*, 1816, (after some other letters had, in the mean time, passed between them on the subject, containing other proposals), in which he said, “*Smith* will pay the money in a banker’s draft or notes, which is the same thing; and in that case a banker’s bill must be got for them to remit, which will be at forty days, and that, together with his bill for the residue, payable in *London*, will be remitted to you, and the bond can be retained till those bills are paid:” and the letter concluded with recommending him (*Welch*) to accept the proposals. To that letter he received no answer,

The debtor afterwards paid 314*l.* to plaintiff in notes of the bank of Messrs. *Cooke and Co.*

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Co. bankers, in *Sunderland*, and delivered the bill at two months for the remaining 300*l.*—The plaintiff concluding (*Welch* not answering his letter) that he had no objection to the mode proposed of remitting the money, took the cash received to the banking-house of Messrs. *Cooke and Co.* and exchanged it for their bill, for the amount drawn on Messrs. *Bruce and Co.* bankers, in *London*, payable at forty days, a mode frequently adopted by him before, to which no objection had been made.—‘But (the bill stated) the said bill of exchange was, by mistake or inadvertence, made payable to the order of the plaintiff, and therefore he was obliged to and did, in order to enable the said defendant to receive the benefit of the same, and without consideration, or any intention or reason to make himself liable to the payment thereof, indorse the same.’

The bill also stated, that shortly after the bill of exchange had been so remitted, *Cooke and Co.* became bankrupts; but that when it was procured their responsibility was in good repute: and that they were the only bankers in or near *Sunderland*; that the plaintiff had requested *Dilworth* to desist from prosecuting the said action, and had explained to him the circumstances under which the bill of exchange had been indorsed by the plaintiff,—that *Dilworth* had never taken any steps against *Welch* on his indorsement of the bill; and that *Welch* had not paid the amount or any part of the bill to the administrators.

The

The defendants put in their joint and several answer, in which *Welch* stated, (*and Dilworth swore that he believed it to be true*) that *Robert Walker*, who was the administrator of the estate of the intestate, had appointed defendant *Welch* to correspond for him, with persons concerned in the affairs of the intestate's estate; and that he (*Walker*) had also appointed the plaintiff, who was a solicitor, residing and practising at *Sunderland*, his agent, for getting in the outstanding personal estate in that neighbourhood, under a power of attorney from *Walker*; and that he received a remuneration for his trouble. That defendant *Welch* did not answer the letter mentioned in the plaintiff's bill, because he considered the proposals contained in it, more objectionable than other proposals previously made by the obligors through the plaintiff, in answer to a former letter, requesting him to get the bond satisfied, and that therefore *Welch* did not answer that letter.

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The answer then after *adverting to, and recognizing the statement of the transaction as set out in the bill*, went on to state, that the house of *Cooke and Co.* were not then in good credit; that they were unable to set forth (except from the information of the bill which they deemed highly improbable) whether the bill of exchange being made payable to the order of plaintiff, was in consequence of mistake or inadvertence, except that they believed that the plaintiff had good reason to believe, that defendant *Welch*
 would

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would not be satisfied to take the bill, without the plaintiff's indorsement on the sole responsibility of Messrs. *Cooke and Co.* and their correspondents in *London*; but they denied it to be true, that the plaintiff was obliged to indorse it under the circumstances charged, or that it was indorsed by him without consideration, insisting that *his receipt of the money on behalf of Walker, and applying it to his own use, or to any use not in pursuance of the object of the power of attorney, was a sufficient consideration for his indorsing the said bill of exchange*;—that shortly after the procuring and remitting the said bill of exchange, Messrs. *Cooke and Co.* became bankrupts, and the bill not being otherwise discountable for the benefit of the personal representative of the intestate, defendant *Welch* indorsed it on the 2d *July*, 1816, and paid it on his own account (which was then in arrear) into the banking-house of the defendant *Dilworth*, at *Lancaster*, where he had kept an account for many years, in order that it might be presented for acceptance, and afterwards for payment;—that it was sent to *London*, on the 3d of *July*, for acceptance, but Messrs. *Bruce and Co.* had then stopped payment, and afterwards became bankrupts;—and that the bill being then duly noted, the present action was brought.

The defendant *Dilworth* submitted, in his answer, that he was a *bonâ fide* holder of the bill for a valuable consideration, as he had suffered the defendant *Welch* to draw upon him to a larger amount

amount than the money secured by the said bill of exchange, and had given him credit in his account, on paying in the bill, for the amount.— And he denied notice of the circumstances attending the indorsement of the draft by plaintiff, *except as previously set forth in the answer.*

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In a further answer, defendant *Dilworth* had stated, that he never was acquainted with any of the alleged circumstances under which the bill of exchange was said to be indorsed, save and except until a few days after the 16th of *August*, 1816, when they were stated in a letter written to him by the plaintiff, and being induced thereby to enquire respecting the matter of *Welch*, he then first learnt the facts detailed in the correspondence, and stated in the former answer.

The usual rule *nisi* for dissolving the injunction, which had been obtained for want of *Dilworth's* answer, having been made on the coming in of the answer,

Dauncey and *Meggison* now shewed cause, submitting, that, as from the facts disclosed by the bill and answer, it was clear that the plaintiff had received the money merely as agent to *Welch*, which he was entitled to consider himself authorized to do, on *Welch's* silence after the proposal made by him on the subject, and had, in that character alone, indorsed the bill of exchange, by means of which it had been re-

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mitted to *Welch* the immediate agent of his principal, without having received any consideration for that indorsement—it was contrary to good faith to sue him on the bill; at least, rather than *Welch*;—and that he was, under the circumstances, entitled to the protection of the Court, and therefore the injunction ought to be continued.

Martin and *Gardner* for the defendants, contended, that the plaintiff had not affected *Dilworth* at least, by having shewn any equity entitling him to call on the Court to restrain *Dilworth* the *bona fide* holder of the bill of exchange for valuable consideration without notice, from proceeding against the plaintiff, as indorser; for if there was any equity as between the plaintiff and *Welch*, it could not reach *Dilworth's* claim, who could not have necessarily had any knowledge of the transaction, or the relative character of the parties; and who was not shewn to have had any notice of the circumstances attending the negociation of the bill, which he only heard from *Welch*, and as stated in his *further* answer, not till the 16th of *August*, 1816, long after the bill had come to his hands.

And they pressed strongly the fact of *Kidson* being the agent, not of *Welch*, but of *Walker*, and his being appointed by the latter by power of attorney.

RICHARDS,

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RICHARDS, *Chief Baron*.—This injunction clearly ought not to be dissolved.—*Walker*, as it appears, employed *Welch* as his general agent, and he also employed the plaintiff as his agent and attorney to get in these particular debts. It is quite clear that the plaintiff received his instructions from *Welch*, and that he was to remit the money, when received, to him. The plaintiff and *Welch* were therefore both agents of the same principal. There was a correspondence set on foot respecting the sum of money due to the intestate's estate, not between *Walker* and the plaintiff, but between *Welch* and the plaintiff. One of the plaintiff's propositions met with *Welch*'s approbation, and afterwards another was made to him, which *he says* did not. He however gives no answer to it, and now contents himself with explaining the cause of his silence, by saying that as he considered the proposals last made to be more objectionable than those contained in the former letters of the plaintiff, and that having consulted with certain other persons interested, who were of opinion that it was not necessary to return an answer, because the plaintiff had had previous instructions, on which he ought to have acted, he did not therefore answer the letter. Whilst the correspondence was going on, the plaintiff, having received part of the money and a bill for the remainder, went to the house of *Cooke and Co.* and got their bill on *Bruce and Co.* for the amount of the money received by him, which he forwarded with the other bill to *Welch*. It would be quite idle

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to affect ignorance in this Court of the state of those two houses at that time, which it is well known were in a falling condition; but that might not have been known to these parties, or if it were, could not materially affect this transaction. (His Lordship having adverted to the case made by the bill.) The plaintiff says, that the draft was drawn in his favor through inadvertence, and that is certainly exceedingly *probable*, as he was only the agent of *Walker* in this business for the purpose of receiving the money and forwarding it. He necessarily indorsed the bill therefore before he sent it to *Welch*, who, though he does not state when he received it, must be taken to have got it in due course of the post. *Welch now* says he was dissatisfied with the remittances in that mode, but he made no objection to it *at the time*, and that is tantamount to an assent. Shall he then, under these circumstances, be permitted to proceed through the medium of another person, against a mere agent, merely because that agent has imprudently put his name on the instrument to satisfy a formality made necessary by this mode of drawing it? It is impossible.

Then does *Dilworth* stand in a different situation? He is a banker, and was also a mere agent to receive the produce of this paper for the accommodation of *Welch*.

Now, independently of the question of whether there was notice of these facts to affect *Dilworth*, we are bound to look into the nature of the transaction. Can the transfer of a bill to a
banker

banker as a mere depositary for presentation for acceptance and payment, make a party answerable who otherwise would not be so?—No such thing; and is *Welch* to say he dealt with the property which, as it had come to his hands under the circumstances of this case, was received for the benefit of the intestate's estate, as if it were his own, and to pay his own debts?—Certainly not.—And if there were nothing else in this case, it is sufficient reason for continuing the injunction against *Dilworth*, that he is in the same situation as *Welch*. Whether, indeed, *Dilworth* then knew all the circumstances respecting this bill, which he now knows is another thing. He knew quite enough to fix him with its equities. And that is clear from the admissions in the answer, in which he joins; for how do these persons deny notice? [His Lordship read that part of the answer.] Such a notion of want of notice is almost as extraordinary, as the notion afterwards expressed of a valuable consideration having been given for the bill;—they have before acknowledged having been acquainted with the correspondence, and it is impossible not to see that *Dilworth* had the notice which those letters furnish.

It is said that both the original and supplemental answers must be taken together in explanation and aid of each other. Sometimes, as where either would not be intelligible without the other, you certainly may so unite them; but if one of the answers be distinct and clear, that is sufficient, although the Court sometimes allows

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a supplemental answer to explain any apparent mistake under which it is obvious that the party has answered. Now in the present case, the defendant *Dilworth* in his further answer states, that he never did become acquainted with the circumstances, his belief of which he swears to in the former answer, until the 16th of *August*, that is however an admission that he then became possessed of a knowledge of the circumstances, and is of itself such a distinct admission of notice as is quite sufficient to sustain this bill. And no allusion is even made in the second answer to the first having been put in under any mistake on the part of *Dilworth*.

Therefore as *Dilworth* clearly ought not to be suffered to proceed in this action against the plaintiff, unless *Welch* might have done so, and he most certainly cannot be permitted to proceed in it; I think this injunction ought to be continued.

GRAHAM, *Baron*, expressed his entire concurrence. The case lies in a very narrow compass (stating the leading facts). The plaintiff's letter was acquiesced in, and acted on, and this bill was sent in consequence, and it was a natural mode of remittance. It was also natural that the draft should have been made payable to the plaintiff; but still it was merely as an agent to *Welch*, and it was indorsed by him in that character. *Welch* afterwards, instead of applying the bill as he ought to have done on account of *Walker*,

uses

uses it as his own, which he had clearly no right to do; and it would be going very far to say in a court of equity that *therefore* he made the plaintiff liable, although he would not otherwise have been so. Then the defendant *Dilworth* must have known these circumstances; indeed he does not effectively deny that he had knowledge; he merely says he had no knowledge *except as stated in the answer, &c.*

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Under all the circumstances it is impossible that a court of equity can allow such bills instruments as these to be thus made use of to the prejudice of innocent persons, contrary to their original and proper purposes of application.

Wood, *Baron*.—I fully concur.—[having stated many of the circumstances.] This bill was clearly made payable to the plaintiff in his character of agent, and it was therefore necessary that he should indorse it *pro formâ*. Having done so merely for the accommodation of the defendant, a court of equity ought not to suffer him to turn round on the agent and fix [him with liability on such an indorsement. Had he indorsed the bill to guarantee the payment, it would have been a very different case; but here it is clear that nothing of that kind was meant, nor was there any consideration for his doing so. The nature of the transaction is very plain.

Then under any circumstances *Dilworth* would be in precisely the same situation as *Welch*, but

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here besides, his right is clearly affected by knowledge of the whole transaction. He appears to have had the same knowledge as *Welch* himself had, and consequently the bill is in his (*Dilworth's*) hands, subject to the same equities as would have attended it in the hands of *Welch*. This injunction therefore ought not to be dissolved.

GARROW, *Baron*, of the same opinion.

Per Curiam.

Rule *nisi* discharged.

Wednesday,
22d April.

THE KING v. RANDELL,

Where a rule is made absolute on payment by the applicant of the costs of the application affidavits made in opposition not read, nor entered in the minutes, nor noticed in the order, will not be allowed on taxation.

GASELEE now opposed a motion made by *Nolan*, on the part of the prosecutors of this outlawry, that the Deputy Remembrancer should allow, on taxation of their costs (allowed on making absolute an order of the 29th *January* last,) the costs and expences of several affidavits made and filed on the occasion of opposing that order. The original application was for a rule to shew

The Court will admit a party claiming goods seized by the sheriff, under a writ of *cepias utlagatum*, to enter his claim, and traverse the inquisition, after the time for so doing has expired, and a *condemni expensas* executed, where the claimant's attorney has mistaken his course, (having brought an action against the sheriff, instead of having claimed and traversed,) on payment of costs.

shew cause why a claimant of goods and chattels seized by the sheriff of *Hants*, under the writ of *capias utlagatum* against the defendant, should not be allowed to enter his claim of property thereto, and traverse the inquisition.

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It appeared that the claimant's solicitor had mistaken his course in bringing an action against the sheriff, instead of entering a claim and traversing the inquisition, and therefore the Court, on being applied to, granted the above order, which they afterwards made absolute, on payment of all the costs of the prosecutors of the outlawry by the applicant.

The question was, whether the costs of the affidavits made, which had never been read, nor entered on the minutes, nor noticed in the rule, (eleven in number), and which therefore the Deputy Remembrancer had disallowed, ought to be paid by the claimant, under the terms on which the Court had made his rule absolute.

The Court were of opinion, that the Deputy Remembrancer had done right, observing that it was a case where the affidavits could not be necessary, as it lay entirely on the applicant to make out a satisfactory case, and therefore he ought not to be burthened with the costs of such unnecessary matters; and they

Refused the motion,

P P S

THOMAS

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Thursday,
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THOMAS V. PEARSE, Esq.

If a deputy sheriff, being in possession of goods seized under an immediate extent, and having received a subsequent *feri facias*, at the suit of a subject—contract with the judgment creditor to deliver him, in satisfaction of his execution a certain quantity of the goods seized, on his paying into the sheriff's hands the debt due to the Crown, which is accordingly paid to him:—and if afterwards, whilst his officer is in the act of delivering and measuring the quantity specified to the plaintiff's agent, to whom he had given up the key, the goods are rescued—the sheriff is liable to the judgment creditor, who may maintain a special assumpsit on the contract, (whether the sheriff be authorized so to contract or not,) or on a common count for goods sold and delivered—or for money had and received.

THE present action was brought against the sheriff of *Essex* (17th *May*, 1816), to recover 562*l.* 0*s.* 8*d.* under the following circumstances:—

The declaration (assumpsit) consisted of five special counts: and stated in substance, that an extent had been prosecuted against *John Hulbert* for that sum, claimed to be due to the Crown for duties on malt made by him—that the sheriff had, by virtue of that proceeding, seized malt to the value of that amount—that the plaintiff had before, &c. recovered judgment against *Hulbert* for a certain debt of 600*l.* and 80*s.* damages, on which he had sued out a writ of *feri facias*, which was delivered to the said sheriff (12th *February*, 1816)—that the sheriff, by virtue thereof, seized and took in execution (21st *March*) a certain other quantity of malt, of less value than the money indorsed to be levied. And thereupon, in consideration that the plaintiff would pay to defendant the said sum of 562*l.* 0*s.* 8*d.* the amount, &c.

In the case of an under-sheriff in the country employing an acknowledged town agent, such an engagement made by the latter is legal, and binding on the sheriff—who must seek his remedy over.

A beginning to measure and deliver, is not such a delivery as will satisfy even this special contract.

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&c. defendant undertook, &c. to suffer and permit plaintiff to have the sale of the said malt so seized and taken, under the said writs of extent and *feri facias*, and to apply and retain the proceeds thereof towards satisfaction of the 562*l.* 0*s.* 8*d.* so to be paid by plaintiff to defendant, and of the debt and damages so recovered, and directed to be levied by the *feri facias*: and that defendant, as such sheriff as aforesaid, would take due and proper care of said malt so seized, &c. until plaintiff should have received the same into his possession for the purpose of sale.—Averment that plaintiff did pay the money &c.—Breach, that defendant did not &c. but on the contrary thereof, by himself and his servants, so carelessly &c. in that behalf, that through such improper conduct said malt was taken away by divers other persons, and wholly lost, and never was delivered to plaintiff, by means whereof &c.

Second count, that for same consideration defendant promised that plaintiff should receive an adequate quantity of the said malt, and until &c. should have the benefit of the security of the said writ of extent for the said sum.

The fifth count stated, that defendant being possessed of two hundred and fifty quarters of malt, value 562*l.* 0*s.* 8*d.* in consideration of that sum undertook to deliver the same, &c.—concluding with the common counts.

The defendant pleaded the general issue.

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On the trial before the Lord Chief Baron, at the sittings in *Michaelmas* Term, the plaintiff recovered a verdict.

Dauncsey obtained a rule in *Hilary* Term, to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial granted on the following grounds:—1st. That it was a verdict against evidence, as far as regarded the delivery of the malt. 2dly. That the promise had not been proved to have been authorized or adopted by the defendant. 3dly. That it was an engagement into which the sheriff had no legal right to enter under the circumstances in evidence in the cause.

It appeared by the report of the Lord Chief Baron, that in *February* 1816, the sheriff, under the writ of extent against *Hulbert*, seized and took possession of certain malt (upwards of four hundred quarters), and other effects, to the value of 1000*l.* and upwards. In *March* following, the sheriff also seized the above-mentioned effects, which were ostensibly the property of *John Hulbert*, under the *fieri facias* mentioned in the declaration, endorsed to levy 600*l.* That the plaintiff entered into an arrangement with the town agent of the under sheriff, on the 18th of *March*, whereby he was to have possession of the malt, on paying him the money directed to be levied under the extent, which he paid him, and took a receipt for it in writing, as for so much money directed to be levied under the extent.

tent. The under sheriff's agent, in consequence, delivered the plaintiff an order, addressed to the bailiff in possession, directing him to quit possession under the extent, and deliver to the plaintiff the malt so seized under the extent and *fieri facias*, which he at first refused; but after the order had been repeated, agreed to deliver two hundred and fifty quarters. He had begun the delivery, by measuring out a few bushels, on the 21st *March*, when *Blyth*, the landlord of premises, laid claim to the goods which had been so seized under the *fieri facias* and extent, having previously given notice in writing to the sheriff's officer, that they were not the property of *Hulbert*: but the sheriff's bailiff, disregarding that notice, he (*Blyth*) rescued the goods out of the sheriff's custody, just after the officer had admitted *Rees* (who attended for the plaintiff, to receive the malt) into the malt-house, for the purpose of giving him possession of it, and had delivered him the key—and the remainder of the malt was never delivered by the officer to the plaintiff.

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Jervis and *Taunton* now shewed cause, submitting that the proof of the promise was a matter of fact, and, as such, had been properly left to the jury. On the question of whether there had been a legal delivery, they insisted that the evidence, when applied to the law on that point, as determined by a series of decisions, had clearly shewn that no delivery had taken place, which they contended ought to have been completely
 and

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and satisfactorily made out; and that on that also the jury had decided. In point of law there can be no delivery of a specific quantity completed till it is measured out, and as here the goods were still in bulk, therefore, though they had been begun to be measured, it was within the cases which have determined, that while the article is in bulk, and measurement, or any other operation is to precede the delivery, there is no delivery till that shall have been done, and the property meanwhile remains in the seller. — *Rugg v. Minett (a)*. — *Wallace v. Breeds (b)*.

The true question then they represented to be, whether the sheriff, the present defendant, was bound by the engagement, and the conduct of the town agent of his under-sheriff. It has been urged, (said they) that even if the engagement were binding on the agent, there was no consideration, and it was therefore *nudum pactum* as to him. The answer is, that he sheriff had a duty to perform, and that he was enabled to do, in a more convenient and less hazardous way, by the arrangement made between him and the plaintiff. It was also put that the sheriff had no right legally to do what he undertook — that he could not deliver over these goods, which in his possession were *in custodia legis*, and could not be transferred but by due course of law. If that were so, it would not be competent to a sheriff to allow a party to redeem his own property so taken, by

(a) 11 East, 210.

(b) 13 East, 522.

satisfying

satisfying the demand in respect of which the seizure had been made, which could not be contended even in argument. Any mode by which the exigency of the writ is satisfied, would be within the scope of the sheriff's authority: and from the very terms of the writ of extent, a discretion is to be inferred as to the Crown being satisfied, the sheriff being commanded to keep possession 'until the Crown be *fully satisfied*.' There can be no doubt that the town agent of the under-sheriff is the servant of the sheriff, and renders his principal civilly responsible for his official engagements. *Saunderson v. Baker* (c), *Ackworth v. Kempe* (d), *Laycock's Case* (e), *Woodgate v. Knatchbull* (f). In this case too the sheriff, having returned the extent satisfied, is bound by that return, as having adopted and sanctioned the transaction.

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They ultimately put the case on the fifth count of the declaration, as being in all respects proved: or that in any event they would be entitled to their verdict on the count for money had and received, on failure of the consideration on which it was paid.

Dauncey and Campbell, in support of the rule, insisted, that if the promise should be held to have been proved, there was also strong evidence that that promise had been performed; for the

(c) 2 Bla. Rep. 832.

(d) Doug. 40.

(e) Latch, 187.

(f) 2 T. R. 148.

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malt was in point of fact in the possession of the plaintiff, by the delivery of the officer, at the time when *Blyth* and his assistants took it forcibly away, and the plaintiff's agents were in the act of measuring and removing the quantity agreed to be delivered to them—or that if it did not amount to a delivery in law in the *ordinary case* of vendor and purchaser, it was still *such a delivery* as would satisfy *this special undertaking*.

They then contended that the sub-agent of the sheriff could not bind him to the performance of a promise which he was not legally authorized to make—and such a promise this was; for his duty was to have kept possession till sale by *venditioni exponas*, or till an *amoveas manus*, and he had no right to judge whether the Crown's demand would have been satisfied by the receipt of the sum paid by the plaintiff—for the case of an extent is in that and many other respects distinguishable from the common process of *feri facias*. And they relied much on the fact of the town agent of the *under-sheriff* being not (as the latter confessedly is) an acknowledged minister of the *sheriff's* appointment, and therefore his acts do not involve the sheriff's responsibility.

The sheriff, (they next insisted) never had such a possession of these goods as to warrant his delivering them to the plaintiff. His was a special possession only, the goods being in fact in the custody of the law. And yet the fifth count
which

which had been much relied on was in the common form, as if the plaintiff were a brewer, and the defendant a maltster. In this case, the agent of the under-sheriff, as such, clearly could not act for the defendant, as a factor for his principal; as well might it be contended, that he might have so bound the defendant, as that an action might have been maintained against him on his warranty of the quality of the malt. So far from the sub-agent being within the scope of his duty in this transaction, he was acting in violation of it, for he had no authority, which, it is necessary he should have, to part with the possession of these goods. The mandatory part of the writ of extent commands that the sheriff do cause the goods, &c. to be appraised and extended, 'and to be taken and seized into our hands, until you receive our further command;' and there is a proviso at the conclusion of every writ, that the goods seized 'You shall not sell, or cause to be sold, till we shall otherwise command you,' which is, very different from the authority given by the *feri facias*.

They denied that the sheriff, by having returned the extent satisfied, had approved and adopted all that had been done in his name under this special contract; but still, even then, they repeated, he would have had no authority to release the goods without the formal sanction of an *amoveas manus* regularly obtained from this Court. The cases which

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which had been cited they distinguished as being all cases of tort, as trespass, or extortion, whereas the present action was founded on contract.

As to the proposition, that this action might be supported on the count for money had and received, it was answered, that if even this were money had and received by the defendant, it was for the use of the King's writ; but in point of fact, it never was received by the defendant, (the sheriff) however that count might have availed the plaintiff, if this action had been brought against the party who had actually received it, that is, the person who was the town agent of the defendant's under-sheriff.

On the whole, they contended that the present action could not in any point of view be maintained against the present defendant.

RICHARDS, *Chief Baron*. — The Court are of opinion, that this verdict ought to stand. My reasons are founded on the special circumstances of this case. [His Lordship stated the facts.] The action is certainly bottomed on a contract, and the main question is, whether the sheriff is bound. Now the sheriff left the affair to the discretion of the town agent, who was certainly as much the agent of the sheriff as the under-sheriff himself was, and it would be a deplorable doctrine in its general consequences if he were not; for thus a sheriff might easily rid himself of all

all responsibility by requiring his deputy to appoint in all cases a sub-agent, for the purpose of discharging himself.

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The case is one of an extraordinary nature undoubtedly, and I do not remember ever to have met with this species of action being brought under such circumstances. We must therefore be governed by principle. [His Lordship, adverting to the circumstances, observed, that it was material to be considered that the plaintiff, by his execution, had the next right after the Crown.] How far the town agent of the sheriff was justified in so contracting with the plaintiff is another matter. He did in fact contract, and he received the money agreed to be paid to him by the plaintiff, and it would be too much to say that he was entitled to put it into his own pocket without performing the consideration, on the faith of which it had been paid to him. He is at least bound to put the plaintiff in the same situation as he was before the contract was made. He certainly contracted to deliver the malt, and he as certainly did not do so.

Then the question is, whether the agent of the under-sheriff, the person who actually made the contract, was such a representative of the sheriff, as that his acts bound him. I am of opinion, that it cannot be contended, even in argument, that the sheriff would not be liable for the official acts of such a person. Whether the sheriff had any right to make such a contract, and part with the
 goods,

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goods, I do not decide. His having engaged to do so is sufficient to sustain this action.

For the defendant it has been contended, that he had, in fact, so far delivered possession, as would satisfy this contract. (Adverting to the evidence.) Such a delivery as this however was not sufficient. There was a specific quantity of this malt, which was in bulk, to be meted, and until that was done, a delivery could not be effected. In that respect this case is not distinguishable from that of the oil, (*Wallace v. Breeds*.) The malt was not even put into a state to be carried away, and the plaintiff's agent being present, assisting the sheriff to measure the quantity, does not make the supposed delivery less inchoate.

Then the case stands thus. The plaintiff engaged with the sheriff's agent to pay so much money, in consideration of his doing that which he has not done: and the agent by that contract bound the defendant, who may have his remedy over, and I cannot help stating that the sheriff has, in that one respect, the advantage of the plaintiff. Then, by his return of the writ, that the debt had been satisfied, he adopts and acknowledges the act of the under-sheriff's agent, and that, although he did not know so much of the matter as we do now. For these reasons, I think that this rule should be discharged.

GRAHAM, *Baron*. The first question is, whether the act of the under-sheriff's agent is the act
of

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of the sheriff, and I think it clearly within the rule *qui facit per alium facit per se*; and if such agent should mistake his course, the sheriff is responsible, for he is also benefited by the acts of the same person. [His Lordship stated the circumstances.] The sheriff, by performing his contract, would have superseded all collateral claims.

Much stress was laid in argument on the position, that by parting with the goods which had been seized, according to the contract on the part of the defendant's agent, without an *amoveas manus*, the sheriff would be made to act in violation of his duty. Now we all know, that it is every day's practice, when goods have been seized by a sheriff, so to arrange the affair, for the purpose of avoiding the disgrace and discredit of suffering it to be made public. But be that as it may, the agent takes upon himself so to act, and he is clearly identified with the sheriff, who is responsible, and should be indemnified, as he most usually is.

Then the agent having undertaken to deliver the goods seized, the question is, whether he has done so, in performance of his promise, according to good faith, and I am clearly of opinion that he has not. Whether the sheriff had a right to part with the goods in this way is another question, not necessarily arising here, and perhaps he may have such a right. He has, however, in point of fact, engaged to do so, and has received the consideration-money, and therefore it does not lie in

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his mouth to say, that he had no right to do that which he had so engaged to perform: and if he had no right so to undertake, he would then have received so much money to the plaintiff's use.

Wood, *Baron*. I do not see any grounds for disturbing this verdict. Two questions have been made: — 1st. That the sheriff has not performed the contract made by him with the plaintiff; and, 2dly. That the agent of the under-sheriff could not make the defendant (the sheriff) responsible for the performance of it. It is admitted, that if the defendant had made the contract, he would have been bound by it. Then the first point is, whether the under-sheriff is answerable for his agent, and the sheriff for both: and I am of opinion that he is, for the acts of the latter are the acts of the former, and each has his remedy over against the other.

A question was made, whether this was a legal contract, (stating the circumstances.) The very form of the writ expresses the purpose and object of it to be, to raise and satisfy the Crown's debt. The plaintiff had an execution executed for another debt, and in order to render his execution available, he agrees to pay the debt due to the Crown, when he is to receive two hundred and fifty quarters of the malt seized. The plaintiff, in fact, accordingly pays the money in satisfaction of the Crown's debt, and that is so returned. Now what is there illegal in all that? There is no fraud either on the Crown or the plaintiff, whose execution was next to be preferred, or on
any

any body. There was therefore no illegality in the transaction.

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The next question is, whether the sheriff's agent, in fact, performed what he had engaged to do, and there can be no doubt on the evidence that he did not.

I am therefore of opinion, that the plaintiff is entitled to recover in this action, either on the fifth count, or the count for money had and received. The fifth count (which his Lordship stated) is precisely proved. Not so the defence. There was clearly no delivery of the two hundred and fifty quarters of malt; for, although the key had been given to the plaintiff, the quantity to be delivered had not then been separated from the bulk. Had that been done, it might have been a delivery, but before the officer could do so, the goods were carried away by a third person. There was, therefore, no delivery, and so the jury have by this verdict very properly found.

GARROW, *Baron*, of the same opinion. The mischief, as my Lord Chief Baron has well observed, would be enormous, if responsibilities were thus allowed to be shifted. [Having remarked on the relative situation of all the different parties, and the notoriety of there being an acknowledged permanent agent in *London* for the county of *Essex*, as there is also for *Middlesex*, his Lordship said, that he considered this case completely within that of *Woodgate v. Knatchbull*, and that

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the sheriff was fixed by the act of the sub-agent.] As to the delivery, said his Lordship, the cases are numerous, which deny that what passed at the malt-house was a delivery. One quarter only had been delivered, in point of law, and two hundred and forty-nine were not: and the pretence of the key having been given over makes no difference in such a case; for it would be a mockery to say, that, if the vendor should tell the purchaser, 'there is the key—go take your goods,' that would be a delivery for any purpose. I therefore think this verdict quite right, and if it had been the other way, I should, most willingly, have concurred in ordering a new trial.

Per Curiam.

Rule discharged.

Saturday,
25th April.

BENEDICT v. THACKERAY.

When the plaintiff has obtained an order to amend, the defendant having submitted to exceptions, the Court will, on motion, order, as of course, if he do not amend within a given time (a week in this instance) the former order to be discharged.

BEAMES moved, pursuant to notice (two days) that the order made in this cause,—‘that the plaintiff might be at liberty to amend his bill, without costs,’ (the defendant having submitted to exceptions,) ‘and that the defendant might answer the amendments and exceptions at the

same

same time,'—might be discharged, unless the plaintiff amend his bill within a week, citing *1 Fowler*, 109.

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The officer certified the motion to be of course.

Ordered.

BIRDWOOD, Assignee of HART, a Bankrupt,
v. RAPHAEL.

Monday,
27th April.

THE special case on which this determination was founded, stated in substance the following facts:

Hart, the bankrupt, previous to the month of *August*, 1812, carried on business in partnership with one *Joseph*, at *Plymouth*, and they had also a house of trade at *Gibraltar*, superintended by the bankrupt's son. The defendant and another person who were partners in business in *London*, were the holders of two bills of exchange, accepted by *Hart* and *Joseph*, value

1523*l*.

Goods pledged (expressly) to secure, by the produce of the sale, acceptors who have taken up and paid bills drawn on them by the owner, are released from further charge as to other bills so taken up and paid subsequently, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale.

And if while the goods remain in the possession of the acceptors, the owner become insolvent, and has committed acts of bankruptcy before the original pledge be entirely redeemed by re-payment of the money secured by it, other advances be then made to him by them, it is not a case of mutual credit within the 5 Geo. II. c. 30. s. 28, and the assignees of the bankrupt may recover the goods in trover.

But the assignees, under such circumstances, having elected to bring trover, cannot afterwards sue the defendant to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bankrupt.

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1523*l.* 8*s.*, which became due on the 4th and 5th *August*, 1812. About that time *Hart* and *Joseph* stopped payment. *Hart* being then in *London*, wrote on the 5th of *August* to his son at *Gibraltar*, stating that the partnership between him and *Joseph* was dissolved, and requesting him to deliver to the house of the defendant and his partner at *Gibraltar*, goods to the amount of 2000*l.* to secure to them the amount of the two bills for 1523*l.* 8*s.* which had been taken up by them. On the 4th *September* following, the defendant and *Joseph* gave a receipt for the goods so delivered in these words, "Received 4th *September*, 1812, of Messrs. *Levi* and *Hart*, thirty three bales of British piece goods, as per account rendered, being for two bills accepted by Messrs. *Joseph* and *Hart*, of *Plymouth*, and paid by Messrs. *Raphael* and *Joseph*, of *London*, the same (value 2019*l.* 10*s.* 8*d.*) to be kept as pledged until further orders."

After the dissolution of partnership between *Hart* and *Joseph*, a meeting of the joint creditors was held, when it was resolved that *Hart* should carry on the business, and a deed was executed by *Joseph*, assigning his interest in the partnership effects to the bankrupt, and a letter of licence was executed by the creditors, (and among them by the defendant and his partner,) to enable the bankrupt to carry on the business on his separate account for one year, under the inspection of the defendant's partner, and two other persons appointed by the creditors, to whom the

the bankrupt was to pay all monies received by him from the house of *Hart* and *Joseph*, at *Gibraltar*, for the benefit of the creditors. The bankrupt carried on the business under the licence till *February*, 1813. In the latter end of *October*, 1812, and in *January*, 1813, he had committed acts of bankruptcy.

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On the 26th *April*, 1813, (there having been another meeting of creditors in the preceding *February*,) a deed of composition was executed by the defendant for himself and partner, for 1523*l.* 8*s.* to which *Joseph* was made a party, for the purpose of assigning his share of the partnership effects to *Hart*. That deed contained a provision that 15*s.* in the pound, on the partnership debts, should be paid by *Hart*, and the creditors released them conditionally on the payment of that composition.

Between the 31st *January*, and 10th *August*, 1813, the defendant and his partner received of the bankrupt the full sum of 1523*l.* 8*s.* with interest.

After the execution of the last-mentioned deed, the defendant and his partner accepted two bills, drawn by the bankrupt, for 1000*l.* each at two months, and sold the goods which had been so deposited with them, through their house of *Joseph* and *Raphael*, at *Gibraltar*, who afterwards sent the bankrupts an account of the sales, ac-

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complicated by the following letter, addressed to him, dated *September 15th, 1813*:—

“ We have the pleasure to inclose an account of sales transmitted by our Messrs. *Joseph and Raphael*, at *Gibraltar*, and the remainder of your goods; and you will now find the whole is accounted for, and hope to your satisfaction.”

“ On the other side, we have made out your account, and you will find a balance yet due to us of 190*l.* 5*s.* 11*d.* which we make no doubt you will find correct; and in order to close the same, we hope you will send us the account as soon as possible, as you are aware that we are in advance to that amount.”

“ Mr. *Hart*, in account with *Raphael* and *Joseph*, debtors.”

“ 1813,

June 28th. To our acceptance for 1000*l.*

500

500

— 2000*l.*

£ s. d.

1813,

July 14th. By account sales rendered by *Joseph* and

Raphael - - 612: 11: 8

By do. do. - 619: 18: 3

Sept. 15th. By do. do. - 577: 4: 2

Balance due to *R.* and *J.* 190: 5: 11

£2000: 0: 0”

A bill

A bill was drawn for the balance, and accepted by *Hart*, but not paid, and a second and third were afterwards drawn, which *Hart* did not accept. A fourth bill was drawn and accepted by *Hart*, but at its maturity it was dishonored, and it was not until some time afterwards that the account was paid.

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The commission of bankruptcy bore date on the 15th of *December*, 1815, and the present action (trover) was commenced in *Trinity* Term, 1816, for the recovery of the value of the goods which had been delivered to the house of *Raphael* and *Joseph*, in consequence of the directions contained in the letter of the 5th of *August*, 1812. On the trial it appeared that another action had been commenced by the present plaintiff, as assignee of *Samuel Hart*, the bankrupt, against the present defendant, and a particular of demand in such an action was given in evidence, in which particular, it was stated, that the plaintiff claimed the sum of 1593*l.* 8*s.* for so much money paid or satisfied by or on account of the said bankrupt, to the defendant after the month of *July*, 1812, and before the issuing of the commission against the said *Samuel Hart*, under circumstances which the plaintiff as assignee as aforesaid, contended entitled him to recover back the same for the benefit of the creditors at large, of the said bankrupt, and which particular was dated the 17th day of *July*, 1816.

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The learned Judge, (*Abbott, J.*) who tried the cause, was of opinion, that as the produce of the goods was not applied in payment of the 1523*l.* 8*s.* but to discharge the 2000*l.* advanced after the act of bankruptcy; and as the sale of those goods was not for the purpose for which they were originally deposited, but for a subsequent and different demand, the plaintiff was entitled to recover, and he therefore directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move,

Lawes, E. for the plaintiff, contended, that he was entitled to retain his verdict on the following grounds.—That the goods were *specifically* pledged for a sum certain, due on a particular transaction — that that money being afterwards paid without resorting to the goods pledged, the pledge was discharged, and could not be charged again by the bankrupt *after* his bankruptcy—and that the 2000*l.* having been advanced by the defendant after the bankruptcy, with full notice of the bankrupt's insolvency at the time when the credit was given. And for the same reasons he contended that these transactions did not constitute, as between the defendant and the bankrupt, a case of mutual credit under the 5 *Geo. II.* c. 30.

Selwyn, for the defendant, submitted, that the original pledge, and the object of it, were created *before* the bankruptcy, and that the transactions amounted merely to the common case of an advance

vance of money on one hand, and a deposit of goods by way of security on the other. Then that pledge not having been redeemed, there subsisted a mutual credit at the time of the bankruptcy, and continued to subsist, notwithstanding those acts of bankruptcy, which had been committed so long ago. And he contended that the meeting of the bankrupt's creditors, and what had taken place on that occasion, (the development of the embarrassed state of the insolvent's affairs, and the execution of the deed of composition by the defendant,) did not fix the defendant with notice of the acts of bankruptcy.

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He then submitted that the defendant was not precluded, by his execution of the composition deed, from resorting to his original lien on the goods pledged; and he cited a case then recently determined, at the Sittings for *Westminster*, in the Court of King's Bench (*a*), not then reported. Lord *Ellenborough* had held, that a deed of composition, executed by creditors after the act of bankruptcy of the debtor, was a nullity, and did not release the debt, or preclude them from petitioning. Payment of composition money, under such a deed, would be bad, and might be recovered back. So, generally speaking, might any money paid after an act of bankruptcy; and thus the defendant might be compelled to pay back to the assignee of the bankrupt the original debt paid since the act of bankruptcy, in the action which had been commenced for that purpose, after he

(a) *Doc*, dem. *Pitcher v. Anderson*, Stark. N. P. 262.

had

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had succeeded in recovering, on the present action, the value of the goods pledged; and in that case the lien would remain, and the defendant would be remitted to his original right. The whole of the transactions, (he contended) as they appear on the case, go to constitute a general account between the bankrupt and the defendant, in which mutual credit was given; and that account should have been first finally settled, and a balance struck; for that balance alone could be claimed on either side.

[*Curia.* That balance should, in such a case, be settled by the commissioners; but this is an action of trover; and the difficulty is how you can introduce a set-off against a tort.]

To that it was answered, that it was not intended to put the defence on the footing of a set-off; and the case of *Smith v. Hodson* (b) was cited; in which Lord *Kenyon* said, that in the mutual credit cases, (*Ex parte Deeze*, and *French and Fenn*,) ‘whether *trover* or *assumpsit* had been brought, the *whole account* ought to have been settled in the way in which it was, because the situation of the parties was not altered, with a view to the bankruptcy,’ having before observed, that ‘in both those cases *the goods had got into the hands of the respective parties prior to the bankruptcy, and without any view of defrauding the rest of the creditors.*’ The same circumstances of distinction surround this case; and the

(b) 4 T. R. 217.

situation of the parties has not been altered. In *Green v. Farmer* (c), Lord *Mansfield* is reported to have answered a similar difficulty which had been suggested, by saying, that 'If it can be set off in a Court of Equity, it may be set off in *trover*, because it is a lien;' and that opinion received the sanction of the assent of Mr. Justice *Yates*. Here also the defendant had a lien; and by analogy with the case of a factor, which this much resembles, the defendant had a lien on these goods committed to his custody for the purpose of securing, by the produce of their sale, the balance of the general account.

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Lawes, about to reply, was stopped by

GRAHAM, *Baron*. This case at first presented very much difficulty; but after having been ingeniously argued on the part of the defendant, I think, (notwithstanding my opinion has been shaken by strong doubts,) that it is clear that this verdict ought to stand. (Having stated the circumstances of the case, and particularly such parts as are here distinguished by italics.) There can be no doubt that the original pledge was specific for the security of the debt arising from taking up the two first bills; and the only circumstance in these transactions which can be said to constitute a mutuality of dealings, and consequently of credit, is their acceptance of those bills. But on that account alone it was

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that the goods were pledged with the defendant, to indemnify him from risk as to that particular debt. If there be any thing continuing the pledge in the words '*till further orders,*' at the conclusion of the receipt, it must necessarily be confined to the orders of persons who should be competent to give any respecting them. *Hart*, after the act of bankruptcy committed by him, had no longer any such authority. He had become bankrupt before the deed of composition was entered into; his affairs were publicly known; and that he himself was in an insolvent state. Before the execution of the deed, the defendant had begun to receive the money for which the goods had been pledged; and it does not appear that he stated to the creditors, as he was bound to have done, that fact, or that he then possessed the goods which had been pledged with him. Then after unequivocal acts of bankruptcy had been committed by *Hart*, the defendant continues to advance him money, notwithstanding his ruined circumstances, and a balance is in consequence ultimately due to him. Now the statute giving the debtor the right of set-off, on the ground of mutual credit, applies only to cases where the debtor has no notice of the bankrupt's insolvency; but here he had actually executed a deed of composition, which cannot be said not to be sufficient notice; and having run the risk with his eyes open, he must take the consequence. The question of mutual credit cannot arise where the credit is created after the act of bankruptcy.

Then

Then we were pressed with a difficulty arising out of the form of this action; and it was urged that a recovery by the plaintiff in this action would not preclude him from suing the defendant for the money which has been paid him, in respect of which those goods were originally delivered to him in pledge. I think, however, that it is quite clear that the assignee cannot succeed in such an action, after having brought *trover* for the goods which had been so redeemed by the defendant. The judgment in this action might be pleaded in bar to any suit adopted for recovery of the money, by the payment of which the assignee alone acquired a right to sue this defendant in *trover*; and he might aver the ratification of the purposes of the pledge by the election made to proceed against him in the action of *trover*.

We have also had some difficulty as to the point made of the commissioners being bound to take the general account fairly and fully between the bankrupt and the defendant, the balance of which alone would be all that the plaintiff would be entitled to recover; and that proposition certainly appears to have received the sanction of Lord *Kenyon*, even where the form of action should be *trover*; but I cannot readily conceive that Lord *Kenyon* had in his mind the distinct idea of a set-off, as applicable to such a form of action, whatever it might be in a case where assignees bring an action for the value of the goods. As to the opinion said to be expressed by Lord *Mansfield*, I should be unwilling to say any thing derogatory

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derogatory to his high legal reputation, but I cannot but consider that his Lordship too much mixed up the question of law with his then familiar notions of the practice of the Courts of Equity. But admitting that in a case so circumstanced as that of *Green v. Farmer*, a plea of set-off might be pleaded to an action of *trover*, this is certainly nothing like the case of a factor holding goods for the purpose of sale. There was a specific purpose for which these goods had been delivered in pledge, and that pledge was to be rendered effectual by their sale. That purpose was answered by other means. Then all mutuality was at an end. After the bankruptcy, it could not arise again. The bankrupt was then no longer *sui juris*, and the parties were bound by his bankruptcy. At the time of the second advance of money to the bankrupt, he was not capable of pledging the goods again; and whatever was done by him after the act of bankruptcy could not affect the goods pledged, for from that period, the property in them resulted to the assignees.

WOOD, *Baron*. I fully concur in opinion with my Brother *Graham*, who has so fully gone into the question that I need say but little. (Having stated the circumstances). When the sum was paid for which these goods had been specifically pledged, there was an end of that transaction, and the pledge was *functus officio*. The property in the goods then immediately reverted to the bankrupt,

bankrupt, and on his bankruptcy, in his assignees, discharged of any lien which the defendant might have had on them.

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It was argued, that the money which had been paid in redemption of the goods being so paid after the act of bankruptcy, might be recovered back, and that in that case the original pledge would be revived. But that cannot be done by the assignees of the bankrupt, because in bringing this action of trover, they must proceed on the ground that the pledge was originally good, and that the property in the goods had become vested in them by reason of the payment of the money by which they were redeemed.

After that redemption nothing appears to have been done in this case, by which the defendant could acquire any further lien. The subsequent bills were accepted by the defendant after the known insolvency of the bankrupt, and the defendant was well aware of that. He therefore acted at his peril, and has no right to retain these goods against the assignees.

It was intimated, that the defendant's situation was somewhat in the nature of that of a factor; but there is no sort of analogy between them. If the defendant had been in the situation of a factor, he would perhaps have still had a lien on the goods; but he was nothing like it. And as to his claim on the ground of the pledge, the owner had become bankrupt, when the defendant

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made himself a second time his creditor, and he could not therefore at that time have any property in the goods, enabling him to pledge or charge them.

GARROW, *Baron*, of the same opinion. The goods were pledged specifically, not generally. If a second pledge had been created *before* the bankruptcy, it would have bound the property, but there was no such thing.

As to the goods having been put into the defendant's possession as a floating security on dealings of mutual credit, nothing of that sort appears; but the specific nature of the pledge operates to restrain the transaction, and to exclude that notion. Whatever was done after the bankruptcy by *Hart*, was done without authority. There is no pretence, therefore, for putting this as a case of mutual credit.

I had at first much doubt on the question of the defendant's liability to refund the money paid to him, notwithstanding the plaintiff's recovering in this action, although I could have no doubt that a court of equity would have restrained him from proceeding in such a suit; but my Brothers have quite satisfied my mind on that point.

Postea to the plaintiff.

MEMORANDUM.

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MEMORANDUM.

Monday,
27th April.

ON its being proposed to the Court to take for argument exceptions which had been filed to an answer, they refused to hear them: intimating a desire that their rule,—that exceptions must be heard at the sitting of the Court before the motions,—should receive publicity, on account of its convenience to the bar and the suitors, and preserving order in the routine of the ordinary business of the day.

Exceptions standing in the paper for argument can only be heard at the sitting of the Court.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, L^D. CH. BARON.

WRIGHT v. SOUTHWOOD and Others.


Wednesday,
29th April,
16th, 20th, 22d.

A DEFENCE of prescriptive payments, in lieu of many of the tithes sought to be recovered, was set up to this bill for an account of the tithe-
able

Semle—Moulds introduced by stating that they are payable by the occupiers, in lieu of the tithes within and through-

out the parish, (except the occupiers of several other farms and lands,) not otherwise described than by their respective names, are ill laid for uncertainty.


Where the defendants had described their farms by so many acres, and an objection was taken at the hearing to a want of sufficient description of the local situation, the Court permitted the cause to proceed, suggesting that if the objection were insisted on, leave would be given to the defendants to file interrogatories for the purpose of enlarging the description.

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able matters taken by them on their farms, against the defendants, who were occupiers, all of which were insisted on, as good moduses. They were put on the record, by the answer, with the following introduction: "That from time, &c. hitherto there have been, and now are, payable yearly, and every year, to the vicar of the said parish of *Pitminster* for the time being, his lessee or farmer, since the endowment or creation of the said vicarage, and to the rector, or other person entitled to the tithes, &c. before the endowment or creation of the said vicarage, at *Easter* in each year, or as soon after as demanded, by each and every occupier of houses, gardens, farms, and lands, within and throughout the said parish, or the titheable places thereof (except the occupiers of the lands there called the glebe lands, a certain farm and lands called *Higher Poundisford*, or the *Barton of Higher Poundisford*, &c. &c. [describing several other farms *by name only*] for and in respect of the same farms and lands, and of which the defendant's respective farms and lands are no part) divers moduses or customary payments, for and in lieu and satisfaction of the tithes of divers matters and things yearly arising, &c.' The answer then proceeded to enumerate them.

Objections were taken early in the cause, of a want of sufficiency and certainty in the description of the defendant's lands to which the moduses were said to apply, as they had in the schedule to their answer described their respective occupations as 'a messuage and several closes,
 pieces

pieces and parcels of arable, meadow, pasture, orchard, and other land, containing, &c.' and it was submitted, that the *local situation* of the land should be more particularly set forth. But the *Lord Chief Baron* ruled, that the defendants had so far sufficiently described their farms as to entitle them to go into their defence, and intimated that if the objection were insisted on, he would allow them, even in that stage of the cause, to file interrogatories, for the purpose of furnishing a fuller description of the locality of their farms.

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The hearing having proceeded,

Dauncey, Martin, and Dowdeswell, the counsel for the plaintiff, took an objection (which had been previously noticed by the *Lord Chief Baron*) to the terms in which the modus was introduced, as being rendered uncertain by the large exception of so many farms, which might extend, for any thing that appeared, over three-fourths of the parish — that it was to be collected from the record, that the defendants meant to rely on farm moduses, whereas the introductory matter was destructive of all accuracy or certainty as to their nature, character, or extent, and which were, as a consequence of the exception, not laid as being either farm, district, or parochial payments — and that that uncertainty was the greater because the defendants had not described either the lands alleged to be covered by the moduses, or the excepted lands by metes and bounds, or by their extent.

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Horne, Shadwell and Wray, contra, contended, that the moduses were sufficiently laid, and were not vitiated by the exception. And in support of that, they cited the case of *Gill v. Horrex (a)*, where this precise objection was over-ruled.

In opposition to that authority, on the other hand, the plaintiff's counsel put the subsequent case of *Vyse v. Dantze (b)*.

RICHARDS, *Lord Chief Baron*. I have been labouring under the difficulty imposed by this objection throughout this cause. I cannot consider this mode of laying the customs as sufficient.

The cause, however, stood over; and this day the *Lord Chief Baron* decreed against the defendants, with costs.

(a) 3 Gw. 892.

(b) 3 Gw. 1124.

Wednesday,
 29th April.

ANONYMOUS.

Application that a plaintiff should give security for costs, must be made before issue joined, although the issue was joined in the preceding vacation

CAMPBELL shewed cause against a rule *nisi*, obtained by *Parke*, that the plaintiff should give security for the costs before proceeding in this action — that the defendant had applied too late,

late, as he might have made the application in *Michaelmas* or *Hilary* term, whereas he did not do so till the present term, and after issue joined; and he cited *Walters v. Frythall* (a), and *Muller v. Gernon* (b).

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Parke, in support of the rule, relied on the case of *Baker v. Hargreaves* (c), and distinguished the conflicting case in *East*, by the ground taken by the Court there, who put their determination on the reason, that, otherwise, they would be obliging *the attorney* to pay the costs. In this case issue was not joined till after *Hilary* term. From a case in the Common Pleas (*Luzaletti v. Powell* (d),) he submitted, it was to be collected, that the Court would have granted such an application after an interlocutory judgment should have been set aside; and in the note made to that case, it is stated from authority, that if a demand of security for costs be first made to the plaintiff's attorney, the Court of King's Bench will make such an order, after notice of trial has been given. And he urged that it was altogether in the discretion of the Court to grant or refuse this sort of motion at any time,

The Court, saying that the cases were not in opposition, because the determination in *Baker v. Hargreaves* had been unequivocally overruled, held, that in all cases an application of this

(a) 5 East, 338.

(c) 6 T. R. 597.

(b) 3 Taunt. 272.

(d) 1 Marsh. 376.

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sort ought to be made in the very earliest stage of the proceedings*, and certainly ought not to be granted after issue joined in any case.

Per Curiam,

Rule discharged,

With costs.

* Vide *Chevalier v. Fianis*, Brod. & Bing. 278; conclusion of the first sentence of the judgment.

Wednesday,
29th April.

BOTTOMLEY v. IKIN.

Where a rule nisi has been obtained, for changing the venue from London to Yorkshire, in Easter Term, as of course, on the common affidavit, (not stating that defendant's witnesses resided there,) the Court will not retain it, on cause shewn that the plaintiff would be materially delayed without any other advantage to the defendant, by analogy, with the established rule that the venue cannot be changed into the northern counties, previous to a Spring Assizes.

CAUSE was shewn by *Manning* against a rule nisi [obtained by *Richards* on a former day (on the common affidavit), for changing the venue from London to the county of York,] on an affidavit made by the attorney for the plaintiff, stating that the action was brought to recover from the defendant, who was surviving partner of an insolvent banking-house, the amount lodged by him in their bank—that the venue had been laid in London for dispatch—that the deponent believed, and was convinced that the venue was sought to be changed, solely for the purpose of delay, and to harass the plaintiff—and that if it should be changed, the plaintiff would be seriously delayed thereby, as he would be unable

to

to obtain judgment till the next *Michaelmas* Term.

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On that affidavit the plaintiff endeavoured to retain the venue, on the ground of there being on the part of the defendant (as he had not stated in his affidavit that any material witnesses resided in *Yorkshire*) no sort of inconvenience even suggested, whereas it had been shewn to be of material consequence to the plaintiff's interest, that the venue should be retained. And it was submitted, that as it was the established rule in all the courts that the venue cannot be changed into the northern counties in the spring, without consent (*a*), on the principle of avoiding delay to the plaintiff, the Court would probably consider this a case where they would, on *the same principle*, refuse to interfere, by granting the defendant's application, at least where, as here, it is made on the common affidavit only.

Richards, for the defendant, relied on the practice.

Per Curiam.

The cause shewn is not sufficient to preclude the defendant from the right to avail himself of the acknowledged course of practice.

Rule absolute.

(a) Tidd's Pr. 636, 6th ed. and the cases there cited.

The

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Friday,
1st May.

The KING (in aid of KEAST) v. FRANKLIN and another.

In an inquisition on an extent in aid, it is sufficient that the prosecutor of the extent be found to be indebted to the Crown (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.

And therefore if an inquisition find the Crown debtor indebted in a sum certain for duties, &c. due between two given periods: and on the trial of a traverse of the Crown's debt, *modo et forma*, it be proved that the debtor was indebted, at the time of the inquisition, in a different sum for duties accruing for a different period, it is not a fatal variance; because the allegation of the amount of the debt, and of

DAUNCEY and *West* now shewed cause against a rule to enter a verdict for the defendants, which had been obtained by *Jervis*, on a point arising out of the pleadings, and reserved by the Lord Chief Baron on the trial at the sittings after last *Hilary* Term.

An extent had issued against the defendants (brewers), at the instance of the prosecutor, who was a maltster. The inquisition taken thereon recited, that it had been found by an inquisition (taken 28th April, 1817), that *Keast* was then justly and truly indebted to the king in the sum of 100*l.* 11*s.* 4*d.* charged on him, *Keast*, between the 3d day of June, 1816, and the 3d of September following, for duties on malt: and it then found, that the defendants were indebted to *Keast* in 95*l.* upon their acceptance of three bills of exchange.

The defendants pleaded, that *Keast* was not then, nor was on the day of taking the said inquisition (28th April) indebted to the king in the sum of 100*l.* 11*s.* 4*d.* or any part thereof, in

the period for which it was due, is not of the substance of the issue, and may be rejected as surplusage. It is enough, if there be any debt, in fact, due to the Crown, at the time of taking the inquisition, to sustain the proceedings, for the being indebted to the Crown is the basis of the extent.

in manner and form as in the said inquisition alleged.

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Replication, protesting the insufficiency of the plea, and taking issue.

The *Lord Chief Baron* read his report, and it appeared that in point of fact there had been a mistake in the finding of the inquisition, as the debt should have been 107*l.* 11*s.* 4*d.* and the period for which the duties were charged should have been stated to have been between the 10th day of *October*, 1816, and the 5th of *January*, 1817, and not between the 3d of *June* and the 3d *September*, 1816, for which latter period the duties had been paid. But it was proved that *Keast* was indebted to the Crown at the time of the taking the inquisition in the latter sum, and for duties accruing during the latter period. On that variance between the debt and period of its accrual, as found by the inquisition, and as proved on the trial, the rule had been granted.

It was now, on shewing cause, contended, that the variance was not fatal, for that the amount of the debt, and the time for which it was due, were not material on this issue — that it was matter of form, and not of substance, the only substantial subject of inquiry on this issue being, whether *Keast* was a debtor of the Crown in any sum, no matter to what amount, and whether he were so at the taking of the inquisition. Both those facts had been found in the affirmative, and therefore the

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the issue was substantially proved. If the jury had returned a special verdict, finding the facts reported to have been proved, and had prayed the opinion of the Court, judgment must have been given for the Crown.

The variance, they submitted, was not more matter of substance than that put by *Littleton (a)*, of a count on an alienation in fee, and a verdict finding an alienation in tail, upon an issue on a plea that the defendant did not alien in manner as the demandant had declared, which is there not to be matter of objection. They also adverted to the notes on sections 483 and 485, to shew the distinction there taken as to when the words *modo et formâ* in pleading are matter of form, as where the issue goes to the point of the action: or are matter of substance, as where a collateral point is traversed, which is material, — and to support the position, that where the words *modo et formâ* are not the substance of the allegation, the traverse ought to go further, and put the true question in issue.

Jervis, in support of the rule, insisted, that the variance on which the objection was founded was material — that it arose on a material fact, and was indeed in a certain degree of the substance of the issue, and therefore fatal to the inquisition and the subsequent proceedings — that

(a) Of Release, lib. 3, cap. 8, and the commentaries.
 sect. 483 — and Ib. sect. 485,

the time and amount of the debt, even if they were otherwise so far immaterial as to render averments of such incidental matter unnecessary, yet having been once averred, they must be proved, and could not be rejected as surplusage. He submitted, that though the traverse *modo et formâ* was on a collateral issue in this case, it was yet essential, and was rather to be compared to the traverse *modo et formâ* of a feoffment, (as put by Lord Coke in his Commentary on the same section (483),) alleged by two, and it is found the feoffment of one, there *modo et formâ* is material: so also where it is pleaded *by deed*, and traversed *absque hoc quod feoffavit modo et formâ*; for if there were no deed, the jury could not find the feoffment. *Co. Litt. Com.* on sect. 483. In this case the jury could not on this issue find a debt due to the Crown, without finding the amount, and the period during which it had accrued, or it would have been a collateral issue.

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He also observed, that it might happen that a defendant (as was the fact in this case) who should not intend to deny a being indebted to the Crown generally, might yet deny a given debt charged *modo et formâ*—and submitted that one indebted to the Crown for duties in a sum certain, might nevertheless traverse a debt alleged to be due on a bill of exchange—that the duties of excise on malt being collected for eight divisions of the year, called quarters, and the trader not being suffered to be in arrear for more than three of those at once, the denial of
 a debt

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a debt of 100*l.* 11*s.* 4*d.* for duties due between *June* and *September*, is perfectly consistent with there being in fact duties payable to another amount for another quarter; and *Keast* being at all times indebted and in arrear to the Crown, by the daily course of his business, for duties, the defendant could not traverse generally his being indebted to the Crown. They might certainly have proceeded on a general owing of money to the Crown, and it might then have been sufficient to have proved any sum due; but if a special sum is found, it must be proved, or a traverser could not be prepared to meet the allegation by proof, if he might thus be thrown off his guard by being so misled by the finding: and it would preclude the plea of tender, or set-off, or other matter of defence; and therefore he submitted that this rule ought to be made absolute.

RICHARDS, *Chief Baron*. — We think this rule ought to be discharged. The real and substantial averment is, that at the time of the inquisition, there was a debt due to the Crown. That was the only question which was necessary to be tried on this issue, and on the evidence given, there certainly could be no doubt that there was a debt due to the Crown from the prosecutor of this extent at that time.

GRAHAM, *Baron*. — I am confident, in the opinion that the substance of this issue was, whether any debt was due to the Crown, and that having been found by the jury in the affirmative,
 is

is sufficient to sustain the verdict for the Crown. There is no principle in this Court more clear, than that the Crown is not bound by any blunder or absurdity on the part of a sheriff, or any of its officers, and on that ground also this proceeding may be sustained. On this inquisition, all that the sheriff had to do was to echo back his instructions, that the prosecutor was indebted to the Crown at the time of the taking the inquisition: but his having chosen to state the particulars as to the amount and the period, certainly does not bind the Crown. That finding of the debt, or rather of the particular circumstances of it, which have been so foolishly introduced, is thus traversed, because it was thought that the sheriff had placed the prosecutor in a dilemma, of which an advantage might be taken in pleading; but it is quite clear that the right of the Crown cannot be affected by the introduction of the impertinent matter. The jury did not however confine or qualify the issue, which was substantially and materially, whether the prosecutor was at all, in any manner and amount, indebted to the Crown, and the verdict of the jury has corrected the defects of the inquisition, by finding a different debt due to the Crown, and negating the existence of the first. That debt being recorded, the period to which it was applicable is of no kind of importance, provided the Court are enabled to see that there is a clear debt established by the verdict, and found to have been due when the extent issued. Nor does it make any difference that this is an extent in aid, for such extents are, for all the purposes of

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of their application, on a footing with extents in chief, and have been always so considered in this Court on all legal questions arising on them.

Wood, Baron, absent.

GARROW, *Baron*, of the same opinion. The substantial question was, whether *any* debt was due from the prosecutor of this extent to the Crown at the time of the inquisition, so as to authorize the prerogative writ and the subsequent proceedings against the defendants. Had the sheriff been assisted by an assessor, he would have been told that he was misleading the jury, in directing them to find the particulars of the debt already found to be due. It has never been the usage so to find debts, and it would be inconvenient, and lead to absurdity, to introduce such a practice. The traverse, though extending to 'in manner and form,' &c. could only be available by bringing into question the existence of an actual debt; and it has been well put, that if a special verdict had been found in the terms of the report, there must have been judgment given for the Crown. Suppose it to have been found, that the debt mentioned in the inquisition had been discharged, but that on a subsequent day, he became indebted to the Crown again in another sum, for duties incurred since, and that he was so indebted on the day of taking the inquisition, concluding with the usual reference to the Court, whether on the whole matter, the affirmative of the issue were proved—could we have done otherwise

wise than have given judgment for the Crown? I fully concur in the opinion, that the subject-matter of the present objection is mere matter of form, and immaterial, and that therefore this verdict ought to stand.

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Per Curiam.

Rule discharged.

THE KING v. WADE, (claiming under a writ of *diem clausit extremum* (10th April, 1817), against GREEN.)

Friday,
1st May.

Demurrer.

THE inquisition taken 23d June, 1817, found that *Green* (the Crown debtor) died on the 30th January, 1816, at *Twyford*, (*Southampton*,) and that he was on the 23d of that month possessed as of his own proper goods and chattels, &c. (referring to an inventory,) of the value of 439*l.* 8*s.* 6*d.* and of money in the navy 5 *per cents.* produced by the sale of other goods, and standing in the books of the Bank, in the names of certain persons who were the trustees of *Green*,

Proceedings by prerogative process, are not within the 4th Anne, ch. 16, notwithstanding the 24th sect.

Plea by an executor of money paid for expences of his testator's funeral, and for proving the will, amounting to 70*l.* and no assets, except, &c. which were not sufficient

under

to pay and satisfy said expences, — held bad, as against the Crown, on a writ of *diem clausit extremum* against the estate of the deceased Crown debtor, on general demurrer — such a plea not being perfect, either as a plea of retainer, or *plene administravit*; or issuable in that form, and wanting necessary averments, as that the sum laid out as alleged was reasonable, and that the executor had retained his own debt.

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under his will; and that he was also on the 30th of *January*, seised and possessed of and in several articles of silver plate, which the jurors appraised at 60*l.* the same had been since converted into money, and the produce of the sale thereof amounting to the sum of 60*l.* had been paid into the hands of one of the said trustees, and by him paid over to the defendant.

The defendant pleaded as to the goods, &c. (valued at 439*l.* 8*s.* 6*d.*) a judgment recovered against *Green* in his life-time on a debt of 2,000*l.*—and that before the issuing of the said writ of *diem clausit extremum*, to wit, on the 22d of *January* aforesaid, she sued out a writ of *feri facias* indorsed to levy 1,000*l.* and 1*l.* 5*s.* costs, which writ was delivered to the sheriff of *Southampton*, and that by virtue thereof, he seised and took in execution the said goods and chattels mentioned in the said inquisition, &c. and which were then and there upon a just and true appraisement appraised and valued at the said sum of 439*l.* 8*s.* 6*d.* mentioned in the said inquisition, and that on the 29th of *January* the said sheriff assigned and delivered possession to her of the said goods and chattels by means of which said several premises she the said defendant then and there became and was possessed of the same as of her own proper goods and chattels, and that a part of the same were afterwards and before, &c. to wit, on the same day and year last aforesaid, sold and converted into money, and produced the said sum of 262*l.* 10*s.* 7½*d.* in the said inquisition mentioned,
 which

which said last-mentioned sum of money was paid to the persons named as trustees in the will of *Green*, as the agents for the said defendant, and with which money the said persons, as such agents, purchased the said sum of money in the navy 5 *per cents.* in the said inquisition mentioned, and which was then standing in their names in the books of the governor and company of the bank of *England*, for the use and benefit of the said defendant.

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And as to the said several articles of plate mentioned in the said inquisition to be of the value of 60*l.* and the produce thereof the defendant alleged that *Green* in his life-time, to wit, on the 8th of *January*, 1816, by his will constituted and appointed the defendant and the said trustees, his executrix and executors, and that after his death, and before, &c., to wit, on the 26th *July*, in the year last aforesaid, the defendant alone duly proved the said will, and took upon herself the burthen and execution thereof—and that after the death of the said *Green*, and before the issuing the said writ of *diem clausit extremum*, to wit, on the 1st of *April*, 1817, she the said defendant had paid, laid out, and expended, for the funeral of *Green*, and in and about the proving of the said will, divers sums of money amounting to the sum of 70*l.*—and that no goods or chattels, which were of the said *Green* at the time of his death, had ever come to, or been in the hands of the said defendant as executrix, as aforesaid, to be administered, except the said articles of plate, and

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which were not sufficient to pay and satisfy the monies so by her paid, laid out, and expended.

Replication—That the said judgment was obtained by the fraud and covin of the said *Green* and the defendant, and with intent to defraud his majesty of his said debt, and after traversing the debt from *Green* to defendant, and the delivery of the goods to her by the sheriff, and her possession thereof before or at the time of the death of *Green*, averred that *Green* was possessed at the time of his death :

Demurrer, as to so much of the said plea as related to the said articles of plate.

Rejoinder, traversing the fraud and the averments of the replication—and Joinder in demurrer.

Nolan, in support of the demurrer, objected to the plea, that the sum alleged to be laid out by the defendant, as executrix, was excessive, and more than what was allowed for such purposes, and that the plea did not aver retainer in part discharge in the usual manner, or that the money so laid out was reasonable and necessary; nor sufficiently deny the possession of assets: and he submitted, that if such a plea were allowed, it would go to cover any sum of money so alleged to be laid out, and no precise issue could be taken on it so as to bring it to an enquiry.

Littledale for the plea contended, that the
 averments

averments were sufficient, for that the Crown might have replied to them the excess, and traversed the right to retain, and the fact of deficiency of assets, which course those averments had rendered necessary; for they shewed that some money must have been expended as alleged, and some part of it must have been reasonable and necessary, so that they covered at least some part of the sum claimed—and that it was not necessary to aver that she had retained, &c. because as she had stated the insufficiency of assets the retainer might be given in evidence without pleading the special matter, for that (as was determined in the case of *Woodward v. Lord Darcy (a)*,) the executor's right to retain a debt, arises by the sole operation of law, and therefore the property of goods in the hands of an executor, as far as the amount of his debt, is at once altered, and becomes vested in him, and he has them of his own proper goods, and not as executor.

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He then submitted, that in this case the Attorney-General should have demurred specially, for he contended that the 24th section of the 4th *Anne*, ch. 16. had expressly extended the several provisions of that act to the cases wherein the king might be the party suing: and he contended that this proceeding was within that statute, for that it was in effect a suit for the recovery of a debt immediately due to the king, and that it was such a one as might be pleaded to

(a) Plowden, 165.

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by the party, and would be ultimately to be tried (the Crown's debt being traversed) by a jury in the usual way, and therefore, *the Crown* was bound by *the express words* of the act.

Nolan in reply insisted that the Crown was not bound by the statute of *Anne*,—and he observed as to the 24th section, (his attention being particularly called to it by the Court,) that the distinction is that proceedings by writ of extent are not *suits for the recovery of debts* within the meaning of that clause, for they are *executions for the satisfaction of debts of record*, and if the objections now made to the plea would be fatal on special demurrer, and if that clause does not bind the Crown, then in the case of an extent this general demurrer which goes to the foundation of the plea, may be maintained for the insufficiency. And he cited the case of the *Attorney-General v. Allgood (b)*, where it was held, that the statute of *Anne* did not apply to suits by the Crown, further than to extend to such suits, the provisions of the statute of jeofails.

He then submitted (admitting the principle of the case of *Woodward v. Lord Darcy*,) that whether this plea was meant to be retainer, or *plene administravit*, it was badly pleaded. If it was more like one than the other, it was perhaps nearer a plea of retainer, and therefore not pleaded

(b) *Parker*, 14; — and see *well*, *Forest's Rep.* 57.
 the case of *The King v. Cald-*

issuably as such : and if it were not a plea of *plene administravit*, the want of averring positively a retainer, was not cured by the effect of a defendant's right to give the retainer in evidence in support of such a plea when there was no such plea on the record. He contended therefore, that the plea was insufficient, and that on this general demurrer there ought to be judgment for the Crown.

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RICHARDS, *Chief Baron*. This is a proceeding on the part of the Crown, which does not come within the general purview of the statute of *Anne*, nor within the particular sections of that statute. Chief Baron *Parker* held that opinion, and he has given the true reason, and I believe that that is the universal opinion of *Westminster Hall*. If then a special demurrer was not necessary in this case, the question will now be whether the plea is good. The defendant's claim as a creditor before the writ issued is not now before us.

She states by her plea that the value of the plate was not equal to the expences incurred by her, &c. (stating that part of the plea): no doubt funeral expences are to be preferred, even to a debt due to the Crown, but we ought to know from the plea what those expences were, and to be able to judge whether they were reasonable and necessary. This is certainly not a plea of *plene administravit*, and as it is pleaded, I do not see how any replication could bring the precise subject-matter at once fairly into issue. If

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more particularity were not observed, such a plea might cover any sum alleged to have been expended by an administrator, and therefore I think it insufficient, and that the demurrer ought to be allowed.

GRAHAM, *Baron*. I do not think that this plea could be sustained on special demurrer; and unless a plea state a sufficient bar, a plaintiff is not called on to reply. It should have averred, that the expenditure was reasonable, and such as the law allows on account of the special matter stated in the plea, which is, in circumstances like the present, a very small sum, and therefore the probability on the face of the plea is against the truth of it.

It was put that this demurrer ought to have been special, and I confess I was much struck with the words of the twenty-fourth section of the statute of *Anne*, but I think, on full consideration, that that act was only meant to extend to the Crown, in cases analogous with suits between subject and subject, as in *scire facias* on bonds, &c. Now certainly writs of extent and *diem clausit extremum* have always been treated as executions, with this difference only, that the Crown does not immediately proceed to sell, and that both are traversable: and accordingly such proceedings are not amongst those enumerated in the 1st sect. of the statute. I am of opinion, therefore, that the general demurrer is proper, and that this plea is incomplete and bad.

GARROW,

GARROW, *Baron*. The most important question raised by this demurrer is, whether the Crown is bound by the twenty-fourth section of the statute of the 4th of *Anne*, and on that I think the authority and the reasons of Lord Chief Baron *Parker* decisive. This is certainly not a suit by the Crown for recovery of any debt immediately owing. It is an execution, and the contest arising on it is between the Crown and some third person, claiming in fact against the Crown, who is therefore *quasi* plaintiff in the suit. There are many other obvious distinctions to be collected from the terms of the act.

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The question then is, whether the plea which has been put on the record is good. The case which has been cited from *Plowden* will not do much for it. In that case the plea was complete and full, here it is defective and argumentative, and therefore I think there ought to be judgment for the Crown.

Per Curiam.

Judgment for the Crown*.

* It may be worth while to notice, as applicable to the two points made in this case, that of the *Attorney General v. Arnold* (a). The defendant there pleaded, that *G. Newell*, (to whom he had been found to be indebted,) between the teste of the extent, and the caption of the inquisition, became bankrupt, and that thereupon a commission of bankruptcy issued, and that proceedings were had thereupon, according to the several statutes made concerning bankrupts, and that he was found a bankrupt: and that thereupon the commissioners assigned over his estate and effects to one Taylor, so that he, the

(a) 7 Vid. Abr. 104. Tit. Cred. & Bank. (Z) 1.

defendant,

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Saturday,
2d May.

ANDERSON v. HODGSON.

An action for goods sold and delivered, not supported by proof of an order by defendant to send the goods to a certain quay, to be left till called for, without shewing a reception and acceptance on the part of the vendee of the goods so sent, where the defendant had not named the particular carrier by whom the goods were to have been conveyed : at least under the circumstances in evidence in the present case a nonsuit for want of proof of a delivery, was refused to be set aside.

THE Lord Chief Baron had nonsuited the plaintiff in this action, for goods sold and delivered, for want of proof of a delivery according to the contract of the parties.

Raine

defendant, was not indebted to the said *G. Newell*, but to the assignees of the commission of bankruptcy.

To that plea the Attorney General demurred, and shewed for cause, 1st. That it was not set forth what act of bankruptcy the said *G. Newell* had committed; and 2dly. That he had not set forth the commission, and that the commissioners had adjudged and declared *G. Newell* to be a bankrupt, and that the plea amounted to the general issue.

WARD, *Chief Baron*, and LOVELL, *Baron*, were of opinion, that the plea was bad, 1st. Because the defendant had not set out what act of bankruptcy *G. Newell* had committed: *for being the case of the Crown*, it was not sufficient to say only that such a day *G. Newell* manifestly became a bankrupt, although that sort of pleading might be good to bar a subject, a plea to a common intent being good, but in case of the Crown it must be certain; and 2dly. Because he had not set forth, that the commissioners had found him a bankrupt: for the commissioners should proceed upon the statutes, and they ought to bring the party within the extent of the acts. — Barons Price and Bury held the plea good.

Thus, on the one hand, it appears, that two of the Barons in that case took a distinction between pleas pleaded in bar of the Crown, holding that a greater degree of certainty and particularity were necessary in such cases, than in pleas between subject and subject. On the other it is observable, that the Attorney General demurred *specially*, for the want of sufficient particularity in the plea.

Raine obtained a rule to shew cause why that nonsuit should not be set aside, and a new trial granted, on the ground that there had been a sufficient delivery given in evidence.

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It was reported to have been proved, that the defendant, who was a flour-dealer, living at *Eccles*, near *Manchester*, gave an order to the plaintiff, a merchant at *Liverpool*, through the plaintiff's broker, living at *Manchester*, to send him fifty barrels of flour, at 59s. *to be left at the Old Quay, in Manchester, till called for*. The defendant was to pay the carriage. The flour was sent by water, and arrived at *Manchester*, but the defendant never sent for it.

Dauncey and *Starkie* now shewed cause, insisting that there had been no delivery in this case, because there had been no acceptance proved, or that the goods had ever been received by the defendant, who must be taken to have repudiated the contracts *in transitu*, as he was entitled to have done, or even after the arrival at the quay at *Manchester*, before acceptance of the goods.

They also submitted, that the contract itself was imperfect, and that this case was within the statute of Frauds, because no contract was produced, and it could not be by parol. In *Kent v. Huskinson* (a), the refusal to keep them, even after the goods had been received, was held not to be a suffi-

(a) 3 Bos. & Pul. 233.

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cient acceptance or receipt to take the case out of the statute of Frauds.

They also cited the case of *Vale v. Bayle (b)*, to shew, that as the defendant in this case had named no particular carrier, the goods were sent at the risk of the vendor, which risk continued, they submitted, till they should have been actually received by the vendee. Delivery generally to a carrier, is not a delivery to a consignee, unless under special circumstances, as in *Dawes v. Peck (c)*; and where the contract is clear, particularly not such a delivery as shall fix a consignee, and here the contract being completed is the sole question. As to the carriage being to be paid by the defendant, that cannot alter the rights of the parties, or oblige a vendee to accept goods sent to him which he did not approve.

Raine and *Parke*, in support of the rule, submitted, that the contract between the parties was not, that the goods were to be *delivered*, but *sent*, and that that contract was performed on the part of the plaintiff—that a delivery to any carrier, under such a contract was a delivery to the vendee, (citing *Dutton v. Solomonson (d)*, where Lord *Alvanley* so held, and *Snee* and another *v. Prescott* and others *(e)*);—and that such a delivery not expressly repudiated is an acceptance.

[To a question put by the Court, it was an-

(b) Cowp. 294.

(c) 8 T. R. 330.

(d) 3 Bos. & Pul. 584.

(e) 1 Atk. 248.

swered,

swered, that the quay at *Liverpool* and that at *Manchester* were one and the same concern, and that there was no other carrier than the one by whom these goods were sent: and the Court observed, that those facts would have made a most material difference if they had been stated in the report, but not having been noticed there, the Court could not receive arguments founded on those circumstances.]

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As to the argument founded on the statute of Frauds, they observed, that all that had been attempted to be proved by parol, was the agency of the carrier, for the purpose of establishing the receipt of the goods sent.

GRAHAM, *Baron*. I have certainly very considerable doubt on this case; but I think the plaintiff has not established his claim by evidence, or I should have had a difficulty in seeing the distinction, in point of law, between a delivery and an acceptance, with reference to this action. Much more has been said on the argument, of the case being within the statute of Frauds, than the facts warrant; for the question here is, what shall be considered to be a delivery according to the contract between the parties, and whether a delivery at the *Old Quay at Liverpool*, was a compliance with the order to send the goods in question to the *Old Quay at Manchester*. The cases are abundant to prove that a delivery to a carrier is a delivery to the consignee; but the difficulty in this case is, that there

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there is no evidence to fix the defendant with knowledge of the course of conveyance, or an adoption of the course which had been pursued, although that difficulty, it is said, is in a great measure got over, by the defendant's agreement to pay for the carriage, and therefore, on this delivery, the goods would have been carried at the risk of the defendant; but that is very doubtful. On the defect of evidence in the plaintiff's case, therefore, I think the nonsuit was right, for there is nothing proved in the plaintiff's favour, except the defendant's liability to pay the carriage of the goods, which can hardly be sufficient of itself to fix him with the contract. Where the delivery to a carrier has been held to be a delivery to the vendee, it is in cases in which the vendee has pointed out expressly the mode of conveyance, and the person by whom the goods are to be conveyed. The plaintiffs give too much generality to Lord *Alvanley's* position, in *Dutton v. Solomonson*; for it could not have been meant to apply to every case of delivery to a common carrier. Under all the circumstances of this case, whatever doubts I may have on the point of law which has been raised, I think the rule ought to be discharged, particularly where it is considered that this is only the case of a nonsuit.

GARROW, *Baron*. This question, with regard to its consequences in the commercial world, is of very great importance. I think too much stress

stress has been laid on the objection of this being within the statute of Frauds, for the delivery, such as it was, is sufficient to take this case out of that statute, which certainly was not intended to destroy all parol contracts.

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As to this delivery, I have certainly always understood that a delivery, by the party's order, to a particular stage coach, to be sent direct, or left till called for, was a delivery to the party, but in the view which I have taken of this case, my opinion, which is founded entirely on the facts reported, is, that there was not such a delivery proved as will support this action. Had it been in evidence, that the carrier was of the defendant's nomination, or that there had been no other, it might have altered my opinion, which is, however, under the circumstances of this case, reconcileable with the decisions which have been cited.

In *Kent v. Huskinson*, the sponge was actually sent back again, and in that case the delivery was not the question. Here the delivery was not completed by any subsequent act on the part of any person. And if Lord *Alvanley*, in the case of *Dutton v. Solomonson*, can be supposed to have determined that a delivery generally to a common carrier would have been sufficient to have sustained this action, I should dissent from that opinion, but I do not think that his Lordship's decision in that case can be so far extended.

As

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As to the defendant being to pay the carriage, that was merely a part of the consideration and price of the goods.

Per Curiam.

Rule discharged.

Saturday,
4th May.

SNOOK and others, Executors, &c. v. MEARS.

Where it was proved that a defendant had, after having denied the existence of a debt demanded of him, replied, to an assertion by the plaintiff, that he had documents in his possession which would prove it, that

It is of no use for me to look at them, for I have no money to pay it now, the Court held that a nonsuit, which had been directed on such a case made and relied on by the plaintiff, was right.


ABBOTT, J. had nonsuited the plaintiffs, on the trial in this cause, at the last *Hants* Assizes, with liberty to move, &c. It was an action of assumpsit by executors, the declaration consisting of the common money counts, and an *insimul computassent* with the plaintiff, after, &c. as executor, &c. Pleas, general issue, and *non assumpsit infra sex annos*.

Casberd obtained a rule for setting aside the nonsuit, and entering a verdict for the defendant.

The report being read, stated that the conversation between the parties, given in evidence, as amounting to an acknowledgment of the debt, did

The legal effect of such conversations, as to how far they are to be considered as admitting debts to be due, or amounting to promises to pay them, is a question rather for the determination of the Court than the jury.

did not, in the opinion of the learned judge, prove such an admission as would support the count on an account stated. The plaintiff's witness swore that the plaintiff had said to the defendant, on the occasion of a settlement of some other matter, 'On looking over Mrs. *Mears's* (the testatrix) accounts, I find that there is a debt due from you of 14*l.* or 15*l.*'—that the defendant then said, 'I do not owe Mrs. *Mears* a farthing'—and that the plaintiff having repeated the assertion, and added, that he would convince the defendant that he owed her the money, by shewing him some papers and receipts which he had in his possession: the defendant replied, '*It is of no use for me to look at them; I have no money to pay it now.*'

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Moore, who now shewed cause, contended, that the words proved could in no sense be considered sufficient to imply an acknowledgment of the debt, and still less a promise to pay. On the contrary, there was an express denial that any thing was due; and, having cited *Rowcroft v. Lomas* (a), and *Coltman v. Marsh* (b), he submitted that the nonsuit was right, and ought not to be set aside.

Casberd, in support of the rule, observed, that one of the grounds stated by the learned judge, on directing the nonsuit, had been, that the defendant could not avail himself of the evidence

(a) 4 M. & S. 457.

(b) 3 Taunt. 380.

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given on the trial, under the count on an *insimul computassent*; because that count did not disclose the foundation of the debt: whereas it was determined, in *Knowles* and others *v. Michel* (c), that a plaintiff might recover on that count, where there had been an acknowledgment of any debt by the defendant. And he contended, that whatever might be the effect of the words, they ought to be weighed by the jury, and should have been submitted to their consideration.

To shew the extent to which the courts have gone in giving effect to admissions of defendants in course of conversation, both as to the acknowledgment of the existence of debts demanded, and the revival of such as had been barred by the statute of Limitations, and what slight admissions have been held to be sufficient, he cited the case of *Bryan v. Horseman* (d), and the authorities there referred to *.

But the Court (GRAHAM, and GARROW *Barons*) held, that the question of the operation and effect of words spoken under such circumstances, was one of law rather than of fact, and therefore more proper for the determination of the Court than of the jury. And having expressed their opinion, that the legal effect of such a conversation as had been proved to have been had

(c) 13 East, 248.

(d) 4 East, 500.

* But see *Mucklow v. St. George*, 4 Taunt. 614.

between

between these parties, had been already decided on in the case of *Rowcroft v. Lomas*, and that the authority of the case of *Bryan v. Horseman*, had been shaken: they held the nonsuit to have been rightly directed, and therefore pronounced the

Rule discharged.

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LAMBE v. The Earl of BLESSINGTON.

Saturday,
4th May.

PRICE moved for an *alias distringas*, with increase of issues to the amount of the debt, on the *venire fac. ad resp.* in this case, on an affidavit, stating that there had been a *distringas* issued, under which 40s. (the common issues) had been levied, and that the debt, for recovery of which the process had been sued out, was *due on a bond for 690l. and interest*:—on which

The common issues, 40s. having been levied under a first *distringas* on a *venire*, the Court increased the issues on an application for a second *distringas* to 100l. the amount of the debt being 690l. due on a bond for that sum, and interest.

The Court (after some consideration) ordered a second *distringas* to levy 100l. *; but they refused,

* There is no criterion by which the amount of issues applied for on successive *distringases* may be fixed, or regulated in practice. It is wholly in the discretion of the Court†, directed by the different circumstances of each particular

† By rule of Court, T. 1753, it is ordered, 'That where issues shall be obtained upon any writ of *distringas* to be issued out of this Court, the plaintiff in such writ may, immediately after the return thereof, apply by motion to the Court for increasing issues upon further process to be issued between the parties: which said issues shall be increased from time to time, at the discretion of the Court.'

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fused, on this application, (being the first not of course) to order issues to be levied to the amount of the debt, which had been applied for in consideration of the high nature of the security.

The sheriff having returned on that second *distringas* that he had levied to the amount of 100*l.* the Court was again moved to increase the issues, when they ordered a third *distringas* to levy 300*l.* under which the sheriff made a third seizure of certain articles, and made his return accordingly.

The Court was then moved for a rule that the sheriff might sell the issues, which was granted; under which the sheriff advertised the articles seized to be sold by auction at the sheriff's office.

particular case. In *West v. Dalton* (a), the Court increased the issues to 4*l.* on the second *distringas*, and 6*l.* on the third; but that case having been reported on account of another point, it does not appear what was the amount of the debt; nor are any of the circumstances of the case stated as to that part of the motion. It therefore serves but little as a guide on such an application.

(a) *Forest*, 29.—And vide *Macmurdo v. Birch*, ante, p. 522.

ELLIOTT v. NICKLIN.

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Monday,
4th May.

DAUNCEY and *Clarke* now shewed cause against this rule, for setting aside the inquisition of damages taken before the sheriff of the county of *Stafford*, on a judgment by default suffered by the defendant, in an action of trespass on the case, for the seduction of the plaintiff's daughter.

It is sufficient notice of a plaintiff's intention to appear before the sheriff by counsel, on the execution of a writ of inquiry that the plaintiff's attorney inform the attorney for the defendant of such intention.

Gaselee obtained the rule, on the grounds, that the defendant had been taken by surprise; (the plaintiff having been assisted by counsel on the execution of the writ of inquiry, without notice given to the defendant)—that the sheriff had improperly received evidence of a promise of marriage having been made by the defendant to the plaintiff's daughter—and that the damages, in respect of the condition of life of the several parties, were grossly excessive.

Had there been no intimation of such an intention, the defendant should have applied to the sheriff to put off the execution of the writ of inquiry.

Evidence may be given on such an occasion, (where the action is for seduction) that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage.

It was stated, on the part of the defendant, in the affidavits on which the rule was moved for, that the jury had awarded 1000*l.* damages to the plaintiff—that no notice had been given to the defendant of the plaintiff's intention to appear by counsel—that evidence of a pre-

vious

In such a case the Court refused to set aside the inquisition, on the ground of the damages being excessive, a 1000*l.* having been awarded by the jury to the plaintiff, although the parties were in a moderate sphere of life.

On a motion to set aside the inquisition on the ground of inadmissible evidence having been received, and allowed to go to the jury, the Court considered themselves bound by the sheriff's minutes (verified by his affidavit) of the evidence which had been offered.

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ELLIOTT
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vious promise of marriage having been given on the part of the defendant (a), had been admitted by the sheriff, and laid before the jury by him in his summing up—and that the defendant was a minor, and in no way of business, having no property of his own, and living at home with his father, who was a publican, and had six other children.

On the other hand, it was sworn, that although it was not stated in the written notice of executing the writ of inquiry, that the plaintiff would attend by counsel, the defendant's attorney was *informed* by the attorney for the plaintiff, that counsel would attend on behalf of the plaintiff: and that the defendant's attorney had said, that he would also procure the attendance of counsel. The affidavit then proceeded to state, as circumstances of aggravation, that the daughter of the plaintiff and the defendant were near neighbours, and had been acquainted from children, and that the parents of both had encouraged their courtship, which was matter of notoriety in the neighbourhood—that the plaintiff's daughter having become pregnant, had suffered a difficult and dangerous labour;—and that the defendant had subsequently conducted himself towards the young woman with insolence. It was also sworn, that the defendant's father was a man of considerable property.

(a) *Dodd v. Norris*, 3 Campb. N. P. 519.

An affidavit was also filed, stating that the under-sheriff had been applied to for a copy of the minutes of the evidence given before him, which was set out; and it was verified by the affidavit of the under-sheriff. It did not appear from those minutes, that evidence had been given, of a promise of marriage having been made use of on the part of the defendant.

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It was submitted on the behalf of the plaintiff, that the damages were not excessive in a case of this nature—that the defendant had had sufficient notice of the plaintiff's intention to appear by counsel, although no written notice had been given—and that the evidence which had been adduced before the sheriff, had been no more than was necessary to shew the footing on which the defendant had been received into the plaintiff's family; and that similar evidence had been received by Lord *Ellenborough* for the same purpose, in the case of *Dodd v. Norris (b)*. And they submitted, that, in this sort of action, if justice should appear to have been done, the Court should not set aside the proceedings, on the ground of excess of damages; still, less on any formal objection. *Edmondson v. Machell (c)*.

Copley, Serjt. and *Gaselee*, attempted to support the rule on the grounds on which it had been obtained.

(b) 3 Campb. 510.

(c) 2 T. R. 4.

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RICHARDS, *Chief Baron*. The ground of surprise in this case is certainly not supported; for the information, sworn to have been given by the plaintiff's attorney to the attorney for the defendant, was quite sufficient to apprize him of the plaintiff's intention to appear by counsel; and if there had been in fact no notice given, the defendant's course was to have applied to the sheriff to postpone the execution of the writ, till he also should have provided himself with the assistance of counsel. Had such a request been made and refused, there might have been something in that ground of objection.

On the point of inadmissible evidence having been received, it does not appear by the sheriff's minutes, that that was the case. As to how far evidence of a promise of marriage might be used in any such case, it is not therefore now necessary to discuss. I concur with Lord *Ellenborough* in the opinion, that a plaintiff may shew that the defendant was addressing his daughter in an honorable way. In judging of the propriety of admitting evidence, we are bound to have regard to the nature of the case.

It appears by the minutes of the evidence given, and which are furnished by the under-sheriff, that it was merely proved that the defendant was considered as so paying his addresses to the plaintiff's daughter. It does not appear that any proof was given of the defendant having used
the

the influence of any direct promise of marriage : and where, as in this case, the under-sheriff is a professional man of intelligence, we are as much bound by his report of the evidence given in such a case as this, as if it were the report of a judge on a motion for a new trial.

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The ground of the damages being excessive, is not satisfactorily shewn. This is one of certain cases wherein it is difficult to draw any line as to *quantum* of damages. One cannot trust one's feelings in matters of this nature, particularly where circumstances of aggravation are brought forward, and most of all such circumstances as levity and insolence. I am not therefore at liberty to say, that on the case before them, the jury have given too much damages. As to their being too large for the defendant's means, that is liable to the same answer. If he is unable to pay them he must suffer in person. I think therefore that this rule ought to be discharged.

GRAHAM, *Baron*, of the same opinion.

[On the objection of the excess of damages, his Lordship observed, that if there was any case in which great latitude might be allowed to juries, it was in this species of action.]

The affidavits, (continued his Lordship) which would shew that the defendant was taken by surprise

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surprise in the attendance of counsel for the plaintiff, are sufficiently answered in point of fact, for they shew that he not only had notice, but that his attorney had endeavoured to procure the assistance of counsel on his behalf also on this occasion.

As to the objection of inadmissible evidence having been received, that would in all probability have vitiated the verdict, if that had been so, and if, bowing to the authority of the case of *Dodd v. Norris*, we should hold that questions, as to any promise of marriage having been made by the defendant to the plaintiff's daughter, ought not to have been asked in such a case as this; but it appears, by the sheriff's minutes, that no such evidence as that a promise of marriage had been made by the defendant, was taken down by him, and we are bound by the sheriff's minutes of the evidence when verified by his affidavit.

I do not think, therefore, that on either of the grounds of objection which have been raised, this Court can interfere.

Wood, *Baron*, was absent.

GARROW, *Baron*, fully concurred.—Although I disclaim the principle which would hold that civil actions should be considered as *media* of punishment where they are founded on moral offences, I cannot, however, regret when they
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are made to operate as a lesson to the invader of domestic happiness. In this case, however, certain grounds are stated on which this inquisition is now sought to be set aside. For the first—the surprize—there is not the slightest foundation. I remember the case of *Dodd v. Norris* well; I was of counsel for the plaintiff in that case: and the sole objection to the question put to the witness was founded on the impropriety of making the breach of a promise of marriage an item in the account in an action for the seduction. But Lord *Ellenborough* on that occasion did not, according to my recollection, lay it down as an inflexible rule, that the question then put could not in any case be asked, or that the fact might not be got at by other more indirect questions, as if she had been asked whether he had not sent her a ring, or her sister had been called to prove that she had been requested to prepare herself for the part of bride's-maid.

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The distinction is where the actual promise of marriage is not relied on as a prominent part of the case, but is merely collateral to the main object of the action, as to vindicate the character of the young woman, when assailed by the defence set up, as was the case here. But the question does not appear to have been put at all, and even if it had, it would not have vitiated this inquisition, unless it were shewn to have been made an improper use of.

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As to the excess of damages, I put that entirely out of the question.

Per Curiam.

Rule discharged.

MEMORANDUM.

Applications for discharge of insolvent debtors, not to be made before the rising of the Court.

THE Court desired it might be understood to be a rule, that applications for the discharge of insolvent debtors could only be made at the rising of the Court, when the other business of the day should be over,

THE END OF EASTER TERM.

AN

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2. The party himself, or his attorney, should make the necessary affidavit in all such cases, and it should contain very satisfactory statements.

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1. Settlement of accounts between attorney and client, not conclusive: the nature of their connection, excepting their accounts from the operation of the general rule in equity. Therefore accounts settled and signed, and where vouchers are delivered up, and a note given for the balance, will be re-opened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of attorney and client, agent and principal; and where the balance is in favor of the former under peculiar circumstances.

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2. On taking such re-opened accounts before the Deputy Remembrancer, it will not be sufficient between such parties that bonds are produced in evidence to prove that the debt for which they were executed existed; and

the obligee will be required to give evidence of the actual payment in money of the full consideration expressed. But in a case of so great length of time, the party will be allowed to make oath of the existence of any voucher, which may not be forthcoming on re-opening such accounts.

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3. An attorney acting as agent for the mortgagor and mortgages, in the matter of the mortgage, and as agent and quasi banker, for the mortgagor (that is, receiving the mortgage money, and giving his accountable receipts to the mortgagor), will not be allowed to charge *the mortgaged premises* with a greater sum, (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) *than shall be proved to have been really paid to him in money by the mortgagees*, on account of and as agent for the mortgagor: nor will the most minute fraction *advanced by him* to make up the integral sum of the mortgage money be allowed to stand as a charge on the estates.

Id.

4. An attorney—having himself, in quality of banker to his client, received money which he has procured to be advanced to such client on mortgage of his estates by a term of years assigned, for which he gives his accountable receipts, and from which he discharges himself by money actually paid to and on account of the principal, and which appears by an account settled and signed by both parties,—will yet not be allowed to charge the mortgaged estates

estates with any sum *ultra* what has been actually advanced by the mortgagees in money, although he seek to charge the estates with no larger sum than the express amount which the term is created to raise, and although there are unsatisfied judgments recovered by him against his client, outstanding at the time when the mortgagor seeks to have the possession of the mortgaged premises delivered up to him, such judgments being held not to be tackable to the mortgages.

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5. On a bill for an account of all transactions between the parties, such account having been decreed, the Court will order, on application, if any of the transactions developed in the course of the investigation appear to warrant it, that the Deputy Remembrancer take a *separate account* (and report it specially) of mortgage transactions strictly speaking, and if the mortgage be found to have been satisfied, (however less the amount may be than the money actually advanced by the attorney) they will admit the mortgagor to redeem: or where the whole has not been satisfied, on paying what shall not have been already paid. *Wood, Baron, dissentiente.*

Ib.

6. Bills of such solicitor for business done, forming items in such account, are still liable to taxation.

Ib.

7. Instruments (as bonds, &c.) will not, under such circumstances, be permitted to stand as a charge on the mortgaged estates, although expressly made part of the consideration in the mort-

gage deed, unless it can be shewn that the consideration of such bonds have been actually paid in money by the mortgagee to the mortgagor.

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8. All the monies advanced by the solicitor, and otherwise due to him *ultra* the mortgage money, must go to the general personal account. *Wood, Baron, dissentiente.*

Ib.

9. If the attorney (being concerned as well for the mortgagor as mortgagee) have been appointed receiver of the rents and profits of the mortgaged estates, and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagees, he will be ordered to pay such balance into Court, notwithstanding the general report have not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands. *Wood, Baron, dissentiente.*

Ib.

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B.

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1. A defendant usually residing in the country, if *arrested* in town, may put in bail by affidavit.

White v. Thomas - - - 13

2. In proceeding against bail on the return of *ca. sn.* in this Court, by *subpoena*, the bail have only *four days* after the return of the writ, in which to render their principal.

Waring v. Jervis - - 170

3. Where the writ was returnable on the last day of term, and the bail had been unable to render the defendant, from the dangerous state of his health, within the four days, the Court refused on their application, *after the expiration of the four days*, to allow them to render the principal on that ground, in consideration of the shortness of the time allowed by that particular mode of proceeding, as abridging the usual time allowed in the other Courts, and even in this Court, by its ordinary process of *quo minus*.

Ib.

Quere, if the application had been made before the expiration of the four days' notice.

4. Where bail have been put in by a defendant, but not perfected, the *sheriff's officer* may put in and justify other bail for his own indemnity.

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5. *Vide* EXTORTION.

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BILL (of Exchange.)

(*Indorsement of.*)

1. Where a bill of exchange— which had been returned by the holder, indorsed by him generally (who had received it from the payee *indorsed by him also generally*) to the drawers, with other bills and money in consideration of another draft for the whole amount, and which bill was then remitted by them (the drawers) to a bill broker, under cover in a letter addressed to one of the firm of a banking-house, (who were the *drawees*, but who had not accepted) accompanied with orders to the broker by the same letter to get the bill discounted, and to pay over the proceeds to the banking-house;—had been seized by a sheriff in possession of the banking house, &c. under an extent, whose officers received it from the postman, at the time of the arrival of the letter in which it was inclosed.—*Quere*, Whether under such circumstances the banking-house had such a property absolute or qualified in the bill as would support an issue, that such second indorser was indebted to the banking-house in the amount of the bill?

The King v. Burn - - 173

Note.—The Court granted a new trial on an objection taken to a verdict (specially) found for the crown, under such circumstances, that the facts did not support the affirmative of such an issue, expressing

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pressing themselves desirous of having before them a fuller state of facts, but giving no opinion on the point of law.

The King v. Burn - - 173

2. A special indorsement of a bill of exchange, does not give a property in it to the indorsee till delivery.

The King v. Lambton - 428

(EQUITY affecting.)

3. Where a solicitor—acting in getting in debts due to the estate of an intestate, under the authority of and as local agent to the administrator, another person being the immediate and general agent of the administrator, under whose directions the solicitor acts,—has received money in the course of his agency, which it is his duty, according to his instructions, to remit to the general agent;—if, in order to effect the object of remittance more conveniently, he procure a banker's bill for that purpose, which is accidentally drawn in his favour, so that it becomes necessary that he should indorse it, and he does so, a court of equity will restrain an action commenced against him on such indorsement, whether brought by the indorsee (the principal agent), or by a banker, with whom the bill has been deposited, for the purposes of being presented for acceptance, and payment by the drawee, although the banker may have given credit for the amount, if the latter can be shewn to have had any knowledge or information of the circumstances attending the transaction, and of the relative situation of the parties.

Kidson v. Dilworth & Welch 564

A further supplemental answer may be used to correct or explain an obvious mistake or ambiguity in the original answer, but not where the former is clear and intelligible without, or with a view to strengthen the defendant's case.

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Vide CONSTRUCTION OF STATUTES, N^o. 2.

C.

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Vide MODUS, N^o. 8.

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Vide STOCK, N^o. 1.

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1. The Court will admit a party claiming goods seized by the sheriff, under a writ of *capias utlagatum*, to enter his claim, and traverse the inquisition, after the time for so doing has expired, and a *venditioni exponas* executed, where the claimant's attorney has mistaken his course, (having brought an action against the sheriff, instead of having claimed and traversed) on payment of costs.

The King v. Randell - 576

(When it may be entered to an extent by assignees of a bankrupt).

2. *Vide* LACHES.]

CLERK IN COURT.

1. It is no objection *in this Court* that bail is put in by a different clerk in Court, without an order first obtained for leave to change the clerk in Court: or notice given of the change to the plaintiff, or his attorney.

Hopkins v. Peacock - - 558

2. As to the change of the attorney

(not being one of the four attorneys of this Court). *Semble*, the Court does not take notice of the immediate attorney in the cause, the proceedings being carried on in the Exchequer in the names of the clerks in court.

Hopkins v. Peacock - - 558

COLLECTOR.

(Of Taxes.)

A joint collector of taxes is liable for any deficiency in the collection for the year, in the amount received by his coadjutor, although he has not himself collected *during the time*, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted or received a share of the poundage at any time.

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N^o. 2.

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(Of STATUTES.)

1. In the notice required to be given to persons within the 24 Geo. II. c. 44, of actions intended to be brought against them, it is not necessary to name all the parties meant to be included in the action, or to express whether the action is intended to be joint or several.

Baz v. Jones - - - 168

2. Where a brewer is liable to the penalties imposed by the 51 Geo. III. c. 87, for receiving and taking into possession the articles prohibited by that statute to be received into possession by brewers, it is no defence to an information founded thereon, that such brewer, besides his trade of brewer, exercised another trade (*ex. gr.* a distiller), in which the use of such articles be lawful and necessary, and the article was found on his distillery premises.

The Attorney-General v. King 195

3. Proceedings by prerogative process are not within the stat. of Anne, ch. 16, notwithstanding the sec. 24.

The King v. Wade - - 621

(Of GRANTS, Royal.)

1. Grant of a liberty in a certain manor to A. who grants the manor, with, &c. to the crown. The crown grants the manor again to B. with all, &c. liberties, &c. in, &c. in as full and ample manner as A. had it—such re-grant passes nothing, but what is expressly mentioned in words, as the subject-matter of such grant, notwithstanding the words of reference to the former grant, which do not extend the operation of the later beyond the precise terms of the patent.

The King v. Capper - - - 217

2. A grant of a liberty in a manor of goods and chattels of tenants in such manor, attainted of felony, is confined to the goods, &c. of felons being locally situate within the manor, and does not pass goods, &c. lying out of it. *Semble*, that if the words were "in, of, or upon," it could not be so extended.

Ib.

3. If the words "*Ex certâ scientiâ, speciali gratiâ, et mero motu*," reduce a royal grant to the rules of construction to which the grants of private persons are subject, doubted.

Ib.

4. Stock, and money in the funds, are not goods and chattels, and do not pass by a grant of *bona et catalla felonum*.

Ib.

5. Stock has no locality, except for purposes of probate and administration.

Ib.

6. Stock is a chose in action.

Ib.

7. A grant of exemption from forestal duties, does not pass the forestal rights from which those duties spring: therefore a grant of exemption from forestal duties, does not give such a right to the grantee as will give him a claim to an allotment on the inclosure of commonable lands within a forest, in consideration of the forestal rights.

The Attorney-General v. The Marquis of Downshire - - 269

8. To pass forestal rights there must be express words, indicative of that particular purpose, in the grant. *Semble*, such rights, properly so called, are not grantable to a subject.

Ib.

9. A grant of a manor to A. with particular words of reference to a previous grant to B. as "with all liberties, &c. &c. &c. which B. had"—"in as full and ample manner as B. held and enjoyed, &c. &c." is not sufficient to pass forestal rights, which had been granted to, and enjoyed by B. without express words.

Ib.

(Of DEVISE.)

(With reference to a local act of parliament.)

Money bequeathed to trustees, to lay out the same, and pay the interest and dividends to the poor inhabitants of a parish for ever, by half-yearly payments—claimed under a local act of parliament, enacting that all gifts, donations, benefactions, and sums of money, which should thereafter become payable to the use of the poor of the parish, not being directed or

liable to be applied for the support of any private or particular poor or charity, or by the respective donors, or otherwise particularly appropriated, and not being sacramental money, should be paid into the hands of the treasurer of the guardians of the poor, thereby appointed in aid of the rate, with power to appropriate it to indigent persons, who had not become chargeable—held, on a claim by such guardians of the poor, to be within the exception of the private act, as being a gift already particularly appropriated by the testatrix.

The Attorney-General v. Freeman
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If a purchaser have been informed, before payment of the purchase-money, that there is any previous incumbrance against the vendor, which would be a lien on the land, it is such sufficient notice as to put him on inquiry; and if the lien turn out to be not of a precisely similar nature,—(as if he have been told that A. had a judgment, who, in fact, had a mortgage)—it is yet, to a certain extent, legal notice, and the

U U 3

Court

Court will set aside conveyances made *after such notice* in prejudice of the prior incumbrancer.

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1. Rule obtained, calling on a commissioner of bail in the country, to shew cause why he should not refund money charged to have been taken by him in the course of his duty, beyond the statutory allowance, discharged on the ground of his having taken extraordinary trouble, *with costs.*

Watson v. Edmunds - - - 2

2. If the sheriff or attorney concerned in conducting the proceeding, having received under an extent for levying a simple contract debt, more than the sum due, shall be ordered to refund, or shew cause; if the rule be made absolute they must pay the costs.

Rex v. Tidmarsh - - - 189

3. Where a sale or mortgage is a fraud on a prior incumbrancer, the Court will give costs against the vendee or mortgagee, on setting aside the deeds.

Taylor v. Baker - - - 306

4. Case of a rule discharged *with costs.*

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5. Where a rule is made absolute on payment of costs of the application, affidavits not read, nor entered in the minutes, nor noticed in the order, will not be al-

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*(Of Bill of Exchange.)**Vide* BILL OF EXCHANGE, N^o. 2.*(Of goods sold.)*

An action for goods sold and delivered not supported by proof of an order by defendant to send the goods to a certain quay, to be left till called for, without shewing a reception and acceptance on the part of the vendee of the goods so sent: at least a non-suit for want of proof of a delivery under such circumstances, was refused to be set aside.

Anderson v. Hodgson - 630*Vide* SHERIFF.

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(To Bill in Equity.)

1. A demurrer to a bill by an annuitant, against an incorporated company and their clerk, for a discovery of funds not appropriated, over-ruled on the ground of the clerk joining in the demurrer, he having no right to demur.

Gibbons v. Waterloo Bridge Company - 491

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Metcalf v. Brown - 560

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*Ib.**Vide* PLEADING (IN EQUITY.)*(At Law.)**Vide* PLEADING (AT LAW),
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DISTRINGAS.

1. A plaintiff having arrested two of partners on a *quo minus*, and proceeded against an absent third by *ven. fac. ad resp.* under which issues, and increased issues, had been levied on the partnership goods—the Court refused, on cause shewn against a rule for that purpose, to set aside the proceedings, and order the money levied to be restored, and the effects to be delivered up: although it was sworn, on the part of the absent defendant, that he was absent on his business of mariner, and not for the purpose of avoiding proceedings.

Macmurdo v. Birch - - 522

2. The common issues, 40s. having been levied under a first *distringas* on a *venire*, the Court increased the issues on an application for a second *distringas* to 100*l.*, and on a third to 300*l.*, the amount of the debt being 690*l.* due on a bond for that sum and interest.

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Birdwood v. Raphael - - 593

EVIDENCE.

(Documentary.)

1. A record of condemnation of goods seized, for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute.

The Attorney-General v. King 195

2. *Quere*, whether such a record is conclusive evidence in any case, of all the facts stated therein, so as to affect a defendant collaterally, in any other proceeding against him, for penalties for the act of forfeiture.

Ib.

Vide The King v. Matthews,
The Attorney-General v. Wake-
field, and
The Attorney-General v. Rey-
nolds, S. P.
in notis, - - p. 202, 203

3. A decision in *Eyre* against a former grantee, submitted to by him, if followed by conformable usage, is conclusive on those claiming under him.

The Attorney-General v. The Marquis of Downshire - 269

4. A document produced by a party as evidence, must be accompanied by proof of the custody from whence he derived it, to satisfy the Court of its authenticity; and if no such proof is given, it will not be permitted to be read, for want of its being shewn to have come from such proper custody, as would make it evidence.

Randolph v. Gordon - 312

5. The more ancient documents, as the Ecclesiastical Survey, &c. &c. are only *prima facie* evidence requiring to be supported by proof of usage, or other confirmation, and may be rebutted.

Drake v. Smyth - - - 309

6. Terriers are of the highest order of evidence in tithe causes, and (*semble*) paramount to usage: and where they record tithes to be payable for certain articles *speciatim*, are presumptive proof of such tithe being payable in kind. Where also they state any fact concerning the *mode* of rendering the tithe, such statement is evidence of that fact, and is allowed to qualify the render, and to define, in great measure, its legal character.

Id.

7. A memorandum, entered by a former vicar in an old book, called a parochial register, and kept in an iron chest at the vicarage, is admissible evidence on behalf of the vicar. Such cus-

tody is proper for such a book, which is common property.

Drake v. Smyth - - - 369

8. An answer, by a former rector, to a bill filed to establish a modus of a certain measure of meal, as to one farm, admitting that the parish is exempt, in consideration of a commutation for meal, is not only admissible, but strong evidence to prove a *district* modus.

De Whelpdale v. Milburn - 485

9. A decree, professing to establish customs of tithing, and modes of payment, some of which being obviously not legal moduses, founded on agreements not ratified by the ordinary and patron, and not on a *bona fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties,—held to be not conclusive or binding either on the Church or the Court.

Jenkinson v. Royston - - - 405

(*Parol.*)

10. Proof of payment (as a modus) of 8d. per acre for hay, by parol testimony and receipts; [although opposed by an extract from the ecclesiastical survey, valuing the tithe hay of the vicarage at 3s.—a terrier recording that *all tithes* (except a moiety of the corn tithe) belonged to the vicar,—several others stating the vicar to be entitled to the tithe of hay, or a modus of 8d. per acre,—and an entry in the parish register of a memorandum, that the vicar had, in a certain year, taken the tithe in kind of some of the occupiers, and agreed with the rest for compositions exceeding

ceeding that sum], held so strong, as that the payment was sent to an issue.

Drake v. Smyth - - - 369

11. The same evidence, in support of a sum of 5s. in lieu of tithe of hay payable by all and every the occupiers of lands and tenements within a certain township, outweighed by terriers, stating that sum to be payable 'for all the hay in their crofts, and nothing paid for all other except herbage.'

Id.

12. Deposition by *T.M.* that a certain book (offered to be given in evidence) belonged to the defendant *F. Stanley*, from whom he received the same: and that he believed the whole of the writing in the said book to be of the hand-writing of *W. Stanley*, D. D. who was, as deponent had been informed, and verily believed, rector of the parish from the year 1690 to 1723; and that the deponent was the better enabled to state of whose hand-writing he believed the said book to be, from his having compared the writing in the said book with the original will in *Doctors' Commons* of the said *W. Stanley*, which appears to be wholly in his own hand-writing; and that he believed the said book, and the said will, to be written by one and the same person,—do not furnish such proof of the hand-writing of *W. Stanley*, as to be evidence that the book was, in point of fact, written by him; because the witness does not state that he has any reasons for believing, or means of knowing, that either the book or the will is of the hand-writing of *W. Stanley*, as from having corresponded with him,

or having seen him write, &c.; for that the terms of the deposition are merely matter of inference in form, and do not warrant the conclusion in substance.

Randolph v. Gordon - - - 312

(Competency of Witnesses.)

13. In an action against a sheriff for a false return of *nulla bona*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them—such person is admissible to prove that they were not the property of the debtor, against whom the execution had issued—because the sheriff cannot maintain an action against him (the witness) for the rescue, after having made such a return—and as to all other persons claiming the goods, the verdict would be *res inter alios acta*, and therefore could not be used to affect their rights in any proceeding against the witnesses.

Thomas v. Pearce - - - 547

(Miscellaneous.)

14. Where it was proved that a defendant had, after having denied the existence of a debt demanded of him, replied to an assertion by the plaintiff, that he had documents in his possession which would prove it, that '*It is of no use for me to look at them, for I have no money to pay it now*;' the Court held, that a nonsuit which had been directed on such a case made and relied on by the plaintiff was right. The legal effect of such conversations as to how far they may be considered, as admitting debts to be due, or amounting

amounting to promises to pay them, is a question rather for the determination of the Court than the jury.

Snook v. Mears - - 636

15. Evidence may be given on an inquisition of damages where the action is for seduction, that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage.

Elliott v. Nicklin - - 641

16. *Vide* AFFIDAVIT.—MODUS.—NONSUIT, N^o. 3.—PRACTICE (plea side), N^o. 7.—PROOF.—INTERROGATORIES.

EXCEPTIONS.

(*To answer.*)

1. The general answer of the Attorney-General cannot be excepted to.

Davison v. The Attorney-General
398

2. Exceptions standing in the paper for argument can only be heard at the sitting of the court.
sec. reg.

Memorandum - - - 607

EXCISE.

Vide CONSTRUCTION OF STATUTES.—INFORMATION, N^o. 2.

EXECUTOR.

Vide PLEADING, N^o. 17.

EXEMPTION.

(*From Tithes.*)

Vide MODUS, *passim*.—TITHES.

EXTENT.

(*What may be taken under.*)

1. A sheriff has no right to levy costs or poundage, or any incidental expences, under an extent, on a simple contract debt; neither has he, or the attorney for the prosecutor of the extent, a right to receive any such costs, &c. under a compromise, in consideration of staying proceedings, from the defendant, under duress of a seizure.

Rex v. Tidmarsh - - 189

2. A parcel made up by a banking-house, sealed, and addressed to another banking-house, containing cash-notes and cheques of the latter, and bills of exchange, specially indorsed to the former, to make up a balance due from them on their general account, and deposited on the 3d July, after the bank was shut, with a woman-servant left in care of the banking-house, to be given to the postman in the morning of the 4th, who was in the habit of calling for such parcels before banking hours—held to be seizable under an extent in aid, tested 2d July, returnable 6th November, on special demurrer to a plea, stating those facts, and tendering issue on the property; and that although the inquisition, finding the debt due to the debtor of the crown debtor was not taken till the 4th of November following: because such circumstances do not amount to a delivery of the parcel to the persons to whom it was addressed, or their agent, and therefore confers no right of property. *Aliter* if delivered to the postman.

The King v. Lambton - - 428

The contents of such a parcel, while remaining in the banking-house, under such circumstances, remain there at the risk of the bankers who made it up, and is still subject to their controul.

The King v. Lambton - - 428

3. A writ of extent binds from the *teste*; and such property as bills of exchange is bound, while in the custody of the debtor.

Ib.

4. *Vide* INQUISITION, N^o. i. —
PRACTICE (IN EQUITY), N^o. 1.

EXTORTION.

(*What is not.*)

A commissioner appointed by the 4 & 5 Wm. and Mary, is not bound by the letter of that act to take no more than 2s. for taking bail, if he have been put to expence by travelling, or has taken extraordinary trouble at the instance of the parties to effect the taking of the recognizance: or where there are other circumstances in the case which afford reasonable ground for a further charge.

Watson v. Edmunds - - 2

F.

FALSE IMPRISONMENT.

A person of decent repute, while attending a fair at a town, in which he was a stranger, in the way of his business as a horse-dealer, having unknowingly uttered a forged note, for which he is afterwards apprehended by private persons, without warrant, on his way home, and carried be-

fore a magistrate for examination, by whom he is immediately discharged, cannot maintain an action for false imprisonment against those who so apprehended him under such circumstances. And those circumstances may be pleaded in justification, and, if proved, will entitle the defendant to a verdict: at least, the Court will not grant a new trial where the jury have been so directed, although the defendant has also pleaded the general issue.

Guppy v. Brittlebank and Potter
525

Vide MALICIOUS ARREST.

FEMBLE.

Vide MODUS, N^o. 13.

FODDER (Green).

Vide TITHES, N^o. 2.

FOREST.

(*Forestal Rights.*)

Vide CONSTRUCTION OF GRANTS,
N^{os}. 7, 8.

FRAUD.

Vide CONVEYANCE.

G.

GARTH-PENNY.

Vide MODUS, N^o. 1.

GEESE.

Vide MODUS, N°. 10.

GOODS.

*(Sold and delivered.)**Vide* DELIVERY OF.—NONSUIT.—
SHERIFF.

GRANT (Royal).

Vide CONSTRUCTION OF.

GRASS.

Vide MODUS, N°. 3.

H.

HAND WRITING.

Vide EVIDENCE, N°. 12.

HEMP.

Vide MODUS, N°. 13.

HUSBANDRY HORSES.

Husbandry horses being used occasionally by the farmer for other purposes, or for other persons, does not deprive the farmer of his privilege of exemption from tithes, where he would be otherwise entitled to it.

Stevens v. Aldridge - 334*Vide* TITHES (Exemption from),
N°. 2.

I.

INCUMBRANCE.

*(Where not defeated by sale.)**Vide* CONVEYANCE.

INDORSER AND INDORSEMENT.

(Of Bill of Exchange.)

Liability and effect of.

Vide BILL OF EXCHANGE, N°. 3.

INFORMATION.

The Court refused, on cause shewn, to discharge a side-bar rule allowing the Attorney General to amend an information for penalties incurred under the Excise Laws, on payment of costs, as to ten new counts which had been added, charging other offences laid on days long subsequent to those in the original information, and to the filing of that proceeding, and the issuing of process thereon, and although the name of a succeeding Attorney General had been introduced; and although the defendant was served with process on the first information, in *Easter Vacation*, returnable the first day of *Easter Term*: and the side-bar rule for amending, was not obtained till the first day of the following *Michaelmas Term*, nor the information so amended filed till the Seal-day after *Michaelmas Term*.

The Attorney General v. Francis King - - - 863

INJUNCTION.

1. To restrain the holder of a promissory note given for the amount of a premium agreed to be paid with an apprentice, from proceeding to recover it at law, refused, where the apprentice having run away, and enlisted for a soldier, of his own accord, returned and demanded fulfilment of his indentures, which was refused by his master, there having been no misconduct on the part of the latter.

Cuff v. Brown - - - 297

2. Where a receiver of rents and profits is enjoined from further receiving, &c. the Court will extend the injunction to his agent, (an attorney in this case,) and commit him also for a breach of the order, although he, living at a distance in the country, have not been regularly served with the injunction, if sufficient circumstances can be shewn, to afford fair and satisfactory evidence that such agent knew of the order—as if his principal have published the opinion delivered by the dissentient judge *only*, and a statement of the judgment has appeared at the same time in the provincial papers. *Wood, Baron, dissentiente*, considering the notice insufficient in this case, at least as to the agent.

Sir Watkin Lewes v. Morgan and Lewis - - - 518

- N. The application should be for a rule to shew cause.

Ib.

3. One of the Court dissenting from an order for an injunction, and notice of an appeal from the de-

cision having been given, is no excuse for disobeying the order.

Sir Watkin Lewes v. Morgan and Lewis - - - 518

4. *Vide WASTE.*

INQUISITION

(*Under Extent.*)

1. In an inquisition on an extent in aid, it is sufficient that the prosecutor of the extent be found to be indebted to the Crown (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.

The King, in aid, &c. v. Franklin 644

Vide PLEADING, N^{os}. 6, 7, 8, & 9.

(*Of Damages.*)

2. In a case of an inquisition of damages for seduction, the Court, where a 1000*l.* had been awarded by the jury to the plaintiff, although the parties were in a moderate sphere of life, refused to set aside the inquisition on the ground of the damages being excessive.

Elliott v. Nicklin - 641

Vide NOTICE, N^o. 1.

INSOLVENT DEBTOR.

Applications for discharge of insolvent debtors not to be made before the rising of the Court.

Memorandum - - - 648

INSUPER.

The Court will set insuper on a collector, where there is a deficit in the

the amount collected, although a re-assessment have been made on the parish, and the amount of the deficiency collected, and paid over to the receiver-general.

In re Bromley - - - 5

INTEREST.

1. Allowed on affirming judgment in an action on breach of covenant for non-payment of an instalment of the purchase-money, although there were an express engagement in the original contract, that interest should be paid only on one instalment.

James v. Emery - - - 529

2. On a judgment recovered against bankers, for a balance due from them, of money deposited in their bank by a customer, the Court will, on affirmance, order the interest to be added to the damages, where the custom of the bank is to allow it. But they will make the order for interest, after the same rate only at which it was the usage of the bank to allow it to their customers.

Ikin v. Bradley - - - 536

Vide PLEADING.

INTERPLEADER.

A plaintiff in an interpleading bill having done all in his power to bring the parties before the Court, may obtain a decree, although one of the defendants have not answered, and is not present at the hearing, if he (having appeared to the process,) has been duly brought into contempt for want of answer.

Farebrother v. Prattent and Aitcheson - - - 303

INTERROGATORIES.

1. Where a party withholds his answer to interrogatories, in vexation and delay, the Court will order them to be taken *pro confessis*,—and will permit the opposite party to make affidavit of the facts inquired of.

Sir Watkin Lewes v. Morgan - 468

2. So where it was objected that a map which had been annexed to an answer by way of schedule, had not been proved, the Lord Chief Baron suggested the same course, saying that he would permit it to be done.

Jenkinson v. Royston - - - 496

3. Where defendants had described their farms by so many acres, and an objection was taken at the hearing to a want of sufficient description of the local situation, the Court permitted the cause to proceed, suggesting that if the objection were insisted on, leave would be given to the defendants to exhibit interrogatories for the purpose of enlarging the description.

Wright v. Southwood - - - 607

ISSUE.

(*It what case a rector is not entitled to demand one as matter of right.*)

1. Where an adverse title to the tithes is set up and established, against a demand by a rector, who offers no evidence to impeach such title, he is not entitled to an issue.

Wilnot v. Hellaby - - - 355

(Where granted.)

- 2: Where title of corn has never within memory been payable in a parish, and a contributory payment exempting the whole parish, is paid by certain, though not all, of the owners and occupiers of estates, the question of whether farm or district modus, must go to an issue.

De Whelpdale v. Milburn - 485

3. *Vide* EVIDENCE, N^o. 10.—MODUS, *passim*.—RANKNESS.

ISSUES.

(Levying—on distringas under *Venire fac. ad resp.*)*Vide* DISTRINGAS.

J.

JUDGMENTS.

1. Where not a charge on mortgaged property, or tackable to the mortgage.
2. *Vide* ATTORNEY AND CLIENT, N^o. 4.
3. *Vide* INTEREST.

JURISDICTION.

The legal effect of conversations importing acknowledgement of demands, as to how far they are to be considered as admitting debts to be due, or amounting to promises to pay them, is a question rather for the determination of the Court than the jury.

Snook v. Mears - - - 636*Vide* PRACTICE (IN EQUITY), N^o. 4.

JUSTIFICATION.

(Of Bail.)

Vide BAIL, N^{os}. 1 & 2.

(Plea of.)

Vide FALSE IMPRISONMENT.

L.

LACHES.

(What is not.)

Where a defendant's effects have been sold under a *venditioni exponas* on an extent, in default of claim, it does not *eo instanti* conclude his assignees under a commission of bankruptcy; and they will be allowed, on application, to enter their claim, and plead in a proper case where the proceedings have gone so far, on payment of costs of the sale and the application, and putting the prosecutors of the extent in the same situation as if they had claimed and pleaded in due time: and in such a case a short delay (as a month) is not laches.

The King v. Adam - - - 39

LAMBS.

Vide MODUS, N^o. 9.—RANKNESS.

LIABILITY.

(Of Principal for the Agent of his Agent.)

Vide BILL OF EXCHANGE, N^o. 3.—SHERIFF.

LIEN.

1. Goods pledged (expressly) to secure, by the produce of the sale, acceptors who have taken up and paid bills drawn on them by the owner, are released from further charge as to other bills so taken up and paid, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale of the goods pledged.

Birdwood v. Raphael - 593

2. *Vide* ATTORNEY AND CLIENT, N^o. 3.

LIMITATIONS.

(*Statute of.*)

Vide NONSUIT, N^o. 4.

LOCALITY.

(*Questions on.*)

Vide CONSTRUCTION OF GRANT.

M.

MALICIOUS ARREST.

(*What not.*)

Where defendant was held to bail on an action for 25*l.*, and pleaded in abatement as to 12*l.* 10*s.*, and the general issue as to the remainder, and verdict found for the plaintiff for the latter sum: On motion for costs, under the 43 *Geo. III. c. 46.*, supported by affidavit that the defendant be-

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lieved the plaintiff had sued out bailable process, for the purpose of extorting from him the whole sum: held, not a case of malicious arrest within the statute.

James v. Francis - 1

MAP:

Proof of, where part of answer.

Vide INTERROGATORIES, N^o. 3.

MEMORANDA.

333. 607. 648.

MILCH COW.

Vide MODUS, N^o. 7.

MILK.

Vide MODUS, N^o. 7.

MODO ET FORMÂ.

Verba Placitandi.

(*Where immaterial.*)

Vide PLEADING (AT LAW), N^o. 15.

MODUS.

1. A modus of one penny payable at *Martinmas* by every owner of a garden, or garth, within the parish, called a garthpenny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips, grown in gardens, is a good modus.

Williamson v. Lord Lonsdale 26

X X

2. A modus of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage, within the said parish, for and in lieu, and satisfaction of, all small prædial tithes arising, &c. upon lands so in tillage, as covering fields with turnips and potatoes, is bad.

Williamson v. Lord Lonsdale 25

3. A modus of 16s., payable on *Easter Monday*, by all the occupiers of land in the township, &c. or some or one, on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment—*if there be evidence given of its having been paid, and for the tithe of agistment*,—will be sent to an issue; for notwithstanding that species of tithe has not been demanded, or recognized till of very late years, yet as it is in fact as old as that of hay; *non constat*, but that it may have been not so neglected before time of memory, and there is therefore no ground for saying that it may not so long ago have been compounded for; for which reason the Court will not decree an account of such tithe on the ground of the anachronism, *where there is strong evidence of the payment, without further inquiry.*

Ib.

4. Payments, professing to cover articles stated in terriers *nomi- natim* to be titheable, held not to be moduses.

Drake v. Smyth - 369

5. A measure of oatmeal, payable in lieu of the tithe of corn and grain, is a good modus.

De Whelpdale v. Milburn - 485

6. A defence to a bill for tithes, of a district modus, where the defendants do not state on the record, and prove by evidence an occupation therein, must fail.

Jenkinson v. Royston - 495

7. A custom—(to pay) for every foal 1d.—for every milch cow 2d. and for every heckforth, or heifer, that had had but one calf, 1d., for and in lieu of milk, *and all profit arising by such cow or heifer, except the calf*,—good; notwithstanding it be not accurately laid, the redundant words at the end being rejectible as surplusage.

Ib.

8. Calves, in kind, to be delivered at the will of the owner, after they are three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed; the parson, if he delayed the fetching, to pay for the keeping. Pigs, in their kind, to be delivered at the will of the owner, after they are nine days old; and if the parson delayed to fetch them, to pay for the keeping afterwards, as reason should require, or the parties could agree—bad, for uncertainty and unreasonableness—being vitiated by the qualification of the delivery at will; and the parson to pay for the keep until delivered.

Ib.

9. Lambs, in their kind, to be delivered the 1st day of *May*; and if under seven, to pay for every lamb a halfpenny; and if seven lambs, and under ten, to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny: and so likewise for any odd number of lambs: and so likewise for calves: but that

that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were sold for; and that tithe of lambs was to be paid in kind, as well those that fell after, as those that fell before the 1st of *May*, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after *May-day* were to be kept by the owner until a month old, and if longer, he was to be paid for keeping; and so of lambs that fell within a month before *May-day*, which were to be kept by the owner until a month old, and if longer, he was to be paid for keeping,—bad; because unintelligibly laid, and binding the parson to pay for keeping the tithe animal beyond a month old. The farmer is, in general, bound to keep it till it be able to live without the mother: but an established custom may controul that rule.

Jenkinson v. Royston - 495

10. Geese and pigs, in kind, to be delivered before *Midsummer*; and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven, and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a-piece for every one, and so for any odd number of pigs or geese—good.

Ib.

11. Bees: for every stock driven or smothered, whereof profit is taken, 2*d.*—*quere.*

Ib.

12. Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped; and if any person should sell sheep after *Candlemas*, and before clipping, to pay for the wool, for every sheep 1*d.* if he sold them out of the parish—good.

Jenkinson v. Royston - 495

13. Hemp and fumble, the tenth sheaf, when pulled, withered, and threshed; the withering and threshing of hemp and fumble, to be considered, deemed, and taken, for and in lieu of the seed—good.

Ib.

14. Rape-seed, the tenth bushel, ready dressed, the parson allowing for the dressing 1*d.* the bushel,—bad, for omission of fractional proportions.

Ib.

15. For onion-seed, the tenth bed, if more than half a pound sown: for less, none—bad.

Ib.

16. For every acre of reed-ground hooken, cropt, or mown in the year, 1*d.*—good.

Ib.

17. Eggs: for every hen or duck two eggs; and for every cock or drake, either of them, three eggs, bad — objection, deficient consideration, and being *ejusdem generis.*

Ib.

18. The inhabitants to pay to the parson yearly, for every acre of fed ground in the parish, for herbage 1*d.* or the fall, at the parson's election—bad.

Ib.

19. *Vide EVIDENCE.*—PLEADING (IN EQUITY).—RANKNESS.—TITHES, N^o. 3.

x x 2

MORTGAGOR AND MORTGAGEE.

1. A purchaser of property, collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase money, is not entitled to insist on having the property re-conveyed to him free from the incumbrance, before he pays the sum so secured by the mortgage: and if he file a bill to have the estate re-conveyed to him, and a declaration of the Court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered merely as a mortgagor, filing a bill to redeem, and must pay all the costs, although he have paid the money into Court.

Drew v. Harman and others - 319

2. *Vide* ATTORNEY AND CLIENT. CONVEYANCE.—COSTS, N^o. 3.

MUTUAL CREDIT.

If goods specifically pledged remain in the possession of the bailees, and in the mean while the owner become insolvent, (having committed acts of bankruptcy before the original pledge was entirely redeemed by re-payment of the money secured by it), should other advances be then made to him by them, it is not a case of mutual credit within the 5 Geo. II. c. 30. s. 28, and the assignees of the bankrupt may recover the goods in trover.

Birdwood v. Hart - 593

N.

NEW TRIAL.

1. Granted on the application of a plaintiff, where the defendant gave no evidence.

Stevens v. Aldridge - 334

2. Refused where matter of fact was the basis of the verdict, and where the amount sought to be recovered, was small, after a former new trial had been granted.

Ib.

3. *Vide* BILL OF EXCHANGE, note to N^o. 1. — FALSE IMPRISONMENT.

NONSUIT.

(Judgment as in case of.)

1. A defendant is not entitled in this Court to judgment, as in case of a nonsuit, if the plaintiff, (having given notice of trial for the next term, after that in which issue is joined,) do not proceed accordingly, but countermand his notice.

Stritch v. Hughes - 187

Rule to show cause, therefore, discharged on a peremptory undertaking.

Ib.

2. The Court refused to set aside a nonsuit in an action for goods sold and delivered, an order by defendant to send the goods to a certain quay, to be left till called for, where the plaintiff could not shew a reception and acceptance on the part of the vendee of the goods so sent.

Anderson v. Hodgson - 630

3. Where it was proved that a defendant had, after having denied the existence of a debt demanded of him, replied to an assertion by the plaintiff that he had documents in his possession which would prove it, '*It is of no use for me to look at them, for I have no money to pay it now,*' the Court held that a nonsuit, which had been directed on such a case made and relied on by the plaintiff, was right; because it did not amount to such an acknowledgment of the debt as would take the case out of the statute of Limitations.

Snook v. Mears - - - 636

4. *Vide* DELIVERY (of goods.)

NOTICE.

1. It is sufficient notice of a plaintiff's intention to appear before the sheriff on the execution of a writ of inquiry by counsel, that the plaintiff's attorney *inform* the attorney for the defendant of such intention.

Elliott v. Nicklin - - - 641

(Of action.)

2. In the notice required to be given to persons within the 24 Geo. II. c. 44. of actions intended to be brought against them, it is not necessary to name all the parties meant to be included in such actions or to express whether the action is intended to be joint or several.

Baz v. Jones - - - 168

(Of trial.)

3. *Vide* NONSUIT. PRACTICE
(plea side), N^o. 3.

(Of prior Incumbrance.)

What sufficient to set a purchaser on inquiry.

Vide CONVEYANCE.

(Of Injunction.)

Vide INJUNCTION, N^o. 1.

O.

OATMEAL.

Vide MODUS, N^o. 5.

ORDERS.

(*Suspending.*)

Vide APPEAL.

P.

PARTIES.

(*To bill.*)

1. In a bill to establish a modus against a dean and chapter, as rector, the ordinary and patron are necessary parties.

De Whelpdale v. Milburn 485

(*To Motion.*)

2. Where an application against a commissioner for extortion, under 4 and 5 Wm. & M. ch. 14.
x x 3 would

would be entertained, it must be made by the party who has paid the money.

Watson v. Edmunds - 2

3. If there are *cestuis que trust*, who ought, in strict regularity, to be made parties to a suit, and are not so brought before the Court, their interests may be ascertained and protected (by indulgence of the Court), by a petition to be presented by them for that purpose, to obviate further delay and expence.

Drew v. Harman and others 319

4. *Vide* LACHES.

PARTNERS.

Vide DISTRINGAS. — PLEADING (AT LAW), N^o. 7 & 8. — WASTE.

PENALTIES.

Vide CONSTRUCTION OF STATUTES. — EVIDENCE, N^o. 2.

PETITION.

Vide PARTIES, N^o. 3.

PLEA.

Vide PLEADING (AT LAW), N^o. 14.

PLEADING.

(*At Law*.)

1. *Semble*. A lessee and farmer of tithes declaring against an occupier under 2 & 3 Edw. VI., as owner and proprietor, is bad.

Stevens v. Aldridge - 334

2. The Court will not permit a defendant to withdraw and plead after a demurrer has been argued.

Partridge v. Court - 412

3. Counts, on promises made to an intestate, may be joined in a declaration by an administrator in an action of assumpsit on such promises, with counts on *promissory notes* given to the administrator since the death of the intestate, as administrator because the amount, when recovered, would be assets in the hands of the administrator.

Ib.

4. *Semble secus*, if a bond, or other higher security, had been given, because the effect of such new and higher security would be an extinction of the simple-contract debt.

Ib.

5. And *semble*, that an administrator *de bonis non* might claim on such promissory note, against the *prima facie* right of the personal representative of the administrator of the intestate.

Ib.

6. It is sufficient if a defendant, claiming goods seized under an extent, traverse the property being in the debtor to the crown's debtor, 'at the time of the seizure, or of taking the inquisition:' and it is not necessary to say, 'at the time of the issuing of the extent.'

The King v. Lambton - 428

7. Where an extent had issued in aid of a company of individuals, (not incorporated) and the inquisition found that their debtor 'was indebted to L. and H'—(two of the company who had executed the usual bond to the Crown as taken

taken from joint insurance companies under the 22 Geo. II. c. 48. on behalf of themselves and the company)—*and the other partners and proprietors of a certain Society, called &c.*—held sufficient on motion in arrest of judgment: and that it was not a fatal objection not to have *named* all the members of the company, in the finding of the debt by the inquisition.

The King v. Ramsbottom and others
447

8. Nor is a finding, that two persons were indebted to L. and H. *and the other partners and proprietors of the unincorporated company, at variance with a command to the sheriff, to find what debts are due to L. and H. on behalf of themselves, and a certain Society, called &c.*

Ib.

9. A recital in a writ of extent, that *two persons are indebted to the Crown by bond (generally), is sufficient to authorize a command to the sheriff to enquire of debts due to such two persons, on behalf of themselves, and other persons.*

Ib.

10. The criterion by which the propriety of the joinder, or non-joinder of parties to a covenant in actions for breaches, is to be determined, is the *interest of the covenantees*. If the interest be several, the action *may be* several, if joint, it *must be* joint, and the terms, or language of the covenant, do not control the principle.

James v. Emery - - - 529

11. The declaration in an action for maliciously causing a writ to

be sued out, whereon plaintiff was imprisoned, stating the process with the *ac etiam* clause, as sued out for the 50*l.* (instead of 30*l.* according to the fact,) and an indorsement of 15*l.* the warrant being for 30*l.* it is a *fatal variance*.

Gadd v. Bennett - - - 549

12. An averment, that the defendant had voluntarily permitted his bill to be discontinued, for want of prosecution thereof, with a conclusion to the record, is not proved by shewing that there had been actually a rule to discontinue regularly taken out; the record having been averred, it must be proved.

Ib.

13. Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs.

Ib.

14. In an inquisition on an extent in aid, it is sufficient that the prosecutor of the extent be found to be indebted to the Crown, (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.

The King v. Franklin - - - 614

15. And therefore if an inquisition find the Crown debtor indebted in a sum certain, for duties &c. due between two given periods, and on the trial of a traverse of the Crown's debt *modo et forma*, it be proved that the debtor was indebted at the time of the inquisition in a *different* sum for duties accruing for a *different period*, it is not a fatal variance, because

x x 4

because the allegation of the amount of the debt, and of the period for which it was due, is not of the *substance* of the issue, and may be rejected as surplusage. It is enough if there be any debt in fact due to the Crown at the time of taking the inquisition, to sustain the proceedings; for the being indebted to the Crown is the basis of the extent.

The King v. Franklin - 614

16. Proceedings by prerogative process are not within the 4th of Ann. ch. 16.

Rex v. Wade - - - 621

17. Plea by an executor of money paid for expences of his testator's funeral, and for proving the will, amounting to 70*l.* and no assets except, &c. which were not sufficient to pay and satisfy said expences; held bad as against the Crown on a writ of *diem clausit extremum* against the estate of the deceased Crown debtor, on *general demurrer*; such a plea not being perfect, either as a plea of *retainer* or *plene administravit*, or fairly issuable in the pleaded form, and wanting necessary averments, as that the assets had been retained on account of the funeral expences; or that the sum laid out was reasonable, &c.

Ib.

18. *Vide FALSE IMPRISONMENT.—NONSUIT.—VARIANCE.*

PLEADING.

(*In Equity.*)

1. A *modus* laid as being 'payable by certain occupiers,' is insufficient, and bad for uncertainty.

De Whelpdale v. Milburn - 485

2. A demurrer to a bill, by an annuitant, against an incorporated company, and their clerk, for a discovery of funds not appropriated, over-ruled on the ground of the clerk joining in the demurrer, he having no right to demur.

Gibbons v. The Waterloo Bridge Company - - - 491

3. The clerk of such a company is without the general rule, and may be made a defendant, although he have no interest, and might be examined as a witness.

Ib.

4. *Semble*—Moduses introduced by stating that they are payable 'by the occupiers, in lieu of the tithes within and throughout the parish, (except the occupiers of several other farms and lands,) not otherwise described than by their respective names, are ill laid for uncertainty.

Wright v. Southwood - 607

5. *Vide DEMURRER (in Equity).—EXCEPTIONS.—INTERROGATORIES.—MODUS.—TITHES, N^o. 3.*

PLEDGE.

Vide LIEN.

PLENE ADMINISTRAVIT.

(*Plea of.*)

Vide PLEADING (AT LAW), N^o. 17.

PLOUGH-PENNY.

Vide MODUS, N^o. 2.

POTATOES.

Vide MODUS, N^o. 1, 2.

PRACTICE.

(Plea and Revenue Side.)

1. If the Court open a rule, which has been made absolute on the usual affidavit of service, to give an opportunity of shewing cause, they will not hear affidavits sworn after the day on which the rule had been made absolute.

Tripp v. Bellamy - - 384

2. The Court will not order a bill of particulars of the charges meant to be relied on in an information for arrears of duties, to be furnished to the defendant by the Attorney General, or other officer of the Crown, or any measure of a similar nature, although the charges cover a space of thirty years, and the defendant have conducted his business at two separate brew-houses, at a distance of twenty miles from each other; at least unless the defendant furnish *the most satisfactory ground* for such an application.

The Attorney General v. Lambirth
386

Quere whether, on a strong case, satisfactorily made out, the Court would not interfere on a qualified application, to assist a defendant to a certain extent.

Ib.

3. The Court will not suffer an application of this nature to stay the trial; and, in the present case, they permitted the Attorney General, notwithstanding a rule was granted to shew cause, to give notice of trial in the mean time.

Ib.

4. Matters of fact not appearing on the record, cannot be called in aid in opposition to a motion in arrest of judgment made on objections apparent on the face of the record.

The King v. Ramsbottom - 447

5. The Court will admit a party claiming goods seized by the sheriff under a writ of *capias utlagatum* to enter his claim, and traverse the inquisition after the time for so doing has expired; and a *venditioni exponas* executed where the claimant's attorney has mistaken his course; and brought an action against the sheriff, instead of having claimed and traversed on payment of costs.

The King v. Randell - - 576

6. Where no intimation has been given of an intention on the part of a plaintiff to appear by counsel on an inquisition of damages, the defendant should apply to the sheriff to put off the execution of the writ of inquiry.

Elliott v. Nicklin - - 641

7. On a motion to set aside an inquisition of damages, the Court considered themselves bound by the sheriff's minutes of the evidence given before him,

Ib.

8. Applications for discharge of insolvent debtors not to be made before the rising of the Court.

Memorandum - - 648

9. *Vide AFFIDAVIT. — BAIL. — CLERK IN COURT. — COSTS. — PARTIES. — PLEADING (AT LAW), passim. — VENUE.*

PRACTICE.

(In Equity.)

1. A motion for restoration of costs, poundage, and incidental expences, wrongfully levied under an extent, may be made after an application to set aside the extent altogether, which had failed.

Rex v. Tidmarsh - - - 189

2. The defendant was permitted to go into the evidence of his right to the tithes, where his title appeared likely to be clearly established, although he had inaccurately stated the subject-matter of his defence in his answer.

Wilmot v. Hellaby - - - 355

3. See a distinction made as to the common course of practice established at the bar, in addressing the Bench, between Courts of Law and Courts of Equity.

Drake v. Smyth - - - 369

4. Bill for the value of tolls, charged to be substracted by the defendant, and claimed to be due for corn sold by sample in market, and for an account, and a declaration of the plaintiff's title:—retained with liberty to bring actions &c. although the plaintiffs had not previously established their right at law.

The Mayor, &c. of Reading v. Winkworth - - - 473

5. A further answer may be used to correct or explain an obvious mistake, or ambiguity in a former one, but not merely to strengthen the defendant's statement of his case.

Kidson v. Dilworth and Welch 564

6. When the plaintiff has obtained an order to amend, the defendant having submitted to exceptions, the Court will, on motion, order, as of course, that if he do not amend within a stated time (a week in this instance) the former order to be discharged.

Benedict v. Thackeray - 592

7. *Vide AFFIDAVIT. — INJUNCTION, note to N^o. 2. — INFORMATION. — INTERROGATORIES. — MODUS, passim.*

PREMIUM.

Vide APPRENTICE.

PREROGATIVE PROCESS.

Vide CONSTRUCTION OF STATUTES, N^o. 3 & 4. — LIMITATIONS.

PRINCIPAL AND AGENT.

Vide ATTORNEY AND CLIENT. — SHERIFF, N^o. 2.

PROMISE.

(To pay money.)

Vide NONSUIT, N^o. 4.

(Of marriage.)

Vide EVIDENCE, N^o. 15.

PROOF.

(What insufficient.)

1. An information on the statute 51 Geo. I. ch. 87, prohibiting brewers

ers from receiving and taking into possession certain articles, charging a 'receiving and taking into possession,' is not sustained, where it is proved that the act of receiving was antecedent to the statute, although the possession has continued ever since.

The Attorney General v. King 195

2. An averment that the defendant had voluntarily permitted his bill to be discontinued, for want of prosecution thereof, with a conclusion to the record, is not proved by shewing that there had actually been a rule to discontinue, regularly taken out: the record having been averred, must be proved.

Gadd v. Bennett - - 540

3. Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs.

Ib.

4. *Vide* NONSUIT, N^o. 3. & 4. — TITHES, N^o. 3.

Q.

QUERIED POINTS.

1. Whether green peas consumed in the family of the grower are exempt from tithes.

Williamson v. Lord Lonsdale 25

2. So as to sheep eaten in the family of the feeder.

Ib.

3. *Vide* BAIL, note to N^o. 3. — BILL OF EXCHANGE, N^o. 3. — EVIDENCE, N^o. 2. — PRACTICE (AT LAW), note to N^o. 2.

R.

RANKNESS.

(What is not.)

A payment of 3d. a head for tithe of lambs not rank, and is issuable where supported by proof; but terriers, stating the vicar to be entitled to 'tithe of lambs,' are sufficient to destroy the presumption that such payment is a modus.

Drake v. Smyth - - 369

RE-ASSESSMENT.

Vide INSUPER.

RECEIVING (into Possession.)

(What is not.)

Vide CONSTRUCTION OF STATUTES.

RECORD.

Vide EVIDENCE, N^o. 1 & 2.

REFERENCE.

(To Deputy Remembrancer.)

Doubts as to the proper mode of assignment, where a conveyance have been decreed on a bill for specific performance, referred to the Deputy Remembrancer.

Wright v. Bell - - 325

REGULÆ GENERALES.

Vide EXCEPTIONS.—RULES OF COURT.

RENT (what.)

Vide TITHES.

REPORT.

(*Of Deputy Remembrancer.*)

Vide ATTORNEY AND CLIENT.

RETAINER.

(*Plea of, by Administrator.*)

Vide PLEADING (AT LAW), N^o. 17.

RETURN (of writ.)

(*Where Sheriff bound by.*)

Vide EVIDENCE, N^o. 7.

REVENUE.

Vide the specific head.

RULE.

(*Of Court.*)

By rule of Court, T. 1753, it is ordered, 'That where issues shall be obtained upon any writ of *distringas* to be issued out of this Court, the plaintiff in such writ may, immediately after the return thereof, apply by motion to the Court for increasing issues upon further process to be issued between the parties: *which said issues shall be increased from time*

to time, at the discretion of the Court.'

Lambe v. The Earl of Blessington,
(*in notis*) 639

Vide EXCEPTIONS.

S.

SECURITY.

(*For Costs.*)

Vide COSTS, N^o. 6.

SEDUCTION.

Vide EVIDENCE, N^o. 15.—INQUI-
SITION, N^o. 2.

SEED.

Vide MODUS, N^o. 14 & 15.

SERVICE.

(*Of Orders of Court.*)

Where a collector of taxes have procured a rule to be made absolute for discharging an insuper, and for the restoration of the money levied under it by *distringas*, without having served the order nisi on the parish, the Court discharging such a rule on motion for that purpose, on such grounds, will do so, *with costs.*

In re Bromley.

5

SHERIFF.

1. Where a deputy sheriff in possession of goods under an immediate

diata extent, receiving a subsequent *feri facias* at the suit of a subject, contract with the judgment creditor to deliver him a certain quantity of the goods on his paying into the sheriff's hands the debt due to the crown, which is accordingly paid to him: if afterwards whilst his officer is in the act of delivering and measuring the quantity the goods are rescued, the sheriff is liable on such contract to the judgment creditor who may maintain special assumpsit on the contract, or recover on a common count for goods sold and delivered, or money had and received. A beginning to measure and deliver is not such a delivery as will satisfy this particular contract.

Thomas v. Pearce - - - 547

2. In the case of an under-sheriff in the county employing an acknowledged town agent, such an engagement made by the latter, is binding on the sheriff, who must seek his remedy over.

Ib.

3. *Vide EVIDENCE, N^o. 13.*

SPECIFIC PERFORMANCE.

(Of Contract.)

The Court will entertain a suit for the specific performance of a contract, for the purchase of a debt. It is within the exception to the rule, that Courts of Equity will not compel specific performance of contracts for the sale of personal chattels.

Wright v. Bell - - - 325

STATUTES.

Henry VIII.

27. ch. 4. (Purveyors of the King.) - - - 293

37. ch. 12. (Tithes in London.) 14. 19

Edward VI.

2 & 3. ch. 13. s. 1. (Not setting out Tithes.) - - - 334. 344

Elizabeth.

13. ch. . (Restraining Statute.) - - - 18

James I.

1. ch. 22. s. 4 & 8. (Trade.—Tanners, Leather Cutters, and Butchers.) - - - 206

William and Mary.

4 & 5. ch. 14. s. 4. (Appointing Commissioners to take Recognizance of Bail.) - 3

Ann.

4. ch. 16. s. 24.; 9. c. 20. (For the Amendment of the Law.) 625

George I.

3. ch. 15. s. 13. (Costs on Ex-tents.) - - - 192

George II.

5. ch. 30. (Bankrupts.—Mutual Credit.) - - - 598

George III.

22. ch. 48. (Stamp Act.—Bonds to the Crown from Joint Companies.) - - - 447

25. ch. 72. s. 9. (Excise.—Cotton Wool.—Stuffs.) - 203. 454

26. ch. 73. (Excise.—Rectifiers and Dealers in British Compounds and Spirits.) - 196. 213

41. ch. 3. s. 17. (Stock.—Annuities.) - - - 246. 251

42. ch. 38. s. 20. (Excise.—Brewers.) - 201. 209. 211

43. ch. 46. s. 3. (Costs on Malicious Arrest.) - - - 1

48. ch. 60. (Excise.—Trade.—Tanners and Leather Cutters.) - - - 197

51. ch. 87. (Excise.—Trade.—Brewers.—Prohibiting Possession of Articles enumerated.) - - - 195. 209

Vide CONSTRUCTION OF.

STOCK.

(*Legal notion of.*)

1. Stock or money in the funds, is not goods and chattels, but a chose in action.

The King v. Capper - 217

2. It has no locality, except for purposes of probate and administration.

Ib.

3. It does not pass by a royal grant of a liberty to have *bona & catalla felonum.*

Ib.

SUB-AGENT.

(*Where Sheriff is responsible for Acts of.*)

Vide SHERIFF.

SUSPENSION.

(*Of Orders of Court.*)

Vide APPEAL.

T.

TAXES.

Vide COLLECTOR.—INSUPER.

TERRIERS.

Vide EVIDENCE, passim.—RANKNESS.

TITHES.

(*Exemption from, by Custom.*)

1. Consumption of titheable articles in the family of the land occupier, is not a ground of exemption.—*Quære* as to green peas.

Williamson v. Lord Lonsdale 25

2. *Semble.*—A farmer claiming exemption, (under the custom) from tithes for green-cut food applied for foddering husbandry horses, must shew that such horses were *bonâ fide* used in husbandry, and that he had no other sustenance (*of any sort*) for them on his farm.

Stevens v. Aldridge 334

3. Where a defence of district modus is set up to a bill for tithes, the defendant must state on the record, and prove by evidence an occupation within the scope of such modus, or they cannot avail themselves of it at the hearing.

Jenkinson v. Royston - - 495

(*In London—on Dwelling-Houses—Rate of.*)

4. —2s. 9d. in the pound on the rent reserved, is the legal rate of the tithes payable to the *London* clergy.

The Minor Canons of St. Paul's v. Crickett - - - 14

(*How estimated.*)

5. The term *Rent*, as used in the decree made under the stat. 37 II. VIII. c. 12. relating to tithes in *London*, means the rent, properly so called, actually and *bona fide* reserved, without fraud or covin, and not the annual value of premises let—the rack rent.

The Minor Canons of St. Paul's v. Crickett - - - 14

6. And fines (to whatever amount) paid on the renewal of leases of dwelling-houses, are not to be considered as increase of rent, or to be taken into calculation, in estimating the amount of the tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let.

Ib.

7. *Vide EVIDENCE.—ISSUE.—MODUS.—PLEADING (IN EQUITY).*

TITLE.

(*To Tolls.*)

The question of plaintiff's title on a bill for tolls, is a question purely legal, and must be decided at law before a court of equity can make an effectual decree; but the plaintiffs having succeeded at law, the Court will entertain a bill for an account, &c.

The Mayor, &c. of Reading v. Winkworth - - - 473

Vide PRACTICE (IN EQUITY),
N^o. 4.

TOLLS.

Vide TITLE TO.—PRACTICE (IN EQUITY).

TRAVERSE.

Vide PLEADING (AT LAW), N^o. 6.

TROVER.

Vide MUTUAL CREDIT.

TRUSTEE.

Vide PARTIES, N^o. 2.

U.

USAGE.

Vide EVIDENCE, passim. — ISSUE.

USURY.

Vide DEMURRER TO BILL IN EQUITY, N^o. 2.

V.

VARIANCE.

(What fatal.)

1. The declaration in an action for maliciously causing a writ to be sued out, whereon plaintiff was imprisoned, stating the *ac etiam* clause of the process as for 50*l*. (instead of 30*l*. according to the fact) and an indorsement for 15*l*. —held a fatal variance.

Gadd v. Bennett - - 540

(What not.)

2. If an inquisition find the Crown debtor indebted in a sum certain for duties, &c. due between two given periods, and on the trial of a traverse of the Crown's debt *modo et formá*, it be proved that the debtor was indebted, at the time of the inquisition, in a different sum for duties accruing for a different period, it is not a fatal variance, because the allegation of the amount of the debt, and of the period for which it was due, is superfluous, and not of the substance of the issue, and may be rejected as surplusage. It is enough, if there be any debt, in fact, due to the Crown, at the time of taking the inquisition, to sustain the proceedings; for the being indebted to the Crown is the basis of the extent.

The King v. Franklin - 614

VENDITIONI EXPONAS.

(In what case the execution of, does not conclude assignees of bankrupt).

Vide LACHES.

(Other persons.)

Vide CLAIM.

VENDOR AND PURCHASER.

Vide CONVEYANCE.—MORTGAGOR AND MORTGAGEE.

VENIRE FACIAS.

(Ad respondendum.)

Vide DISTINGUAS.

VENUE.

1. Where a rule nisi has been obtained for changing the venue from London to Yorkshire, in Easter Term, as of course on the common affidavit, (not stating that defendant's witnesses resided there) the Court will not retain it on cause shewn that the plaintiff would be materially delayed without any other advantage to the defendant, by analogy with the established rule that the venue cannot be changed into the northern counties previous to a Spring Assizes.

Bottomley v. Ikin - - 612

2. The Court will discharge a rule obtained by a defendant to change the venue in an action against him by the assignees of a bankrupt, on the usual affidavit that the cause of action arose in another county, and that his witnesses reside there: the plaintiff swearing, that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the venue is sought to be removed, and undertaking to give evidence in the original, or the third county; and that, although the defendant have agreed

agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt.

Bowden v. Glasson - 359

The costs to abide the event. *Ib.*

VERDICT.

On questions of fact, is conclusive.

Stevens v. Aldridge - 334

VOUCHERS.

How supplied, where lost under particular circumstances.

Vide ATTORNEY AND CLIENT,
N^o. 2.

W.

WASTE.

The plaintiff and defendant (partners) agreeing to dissolve their

partnership, and that defendant on payment of half the value of the effects shall take the whole—the defendant takes possession of the plaintiff's premises, but fails to make payment, and pulls down part of the buildings—held that it is not waste: and an injunction to restrain him for so doing refused.

Cofton v. Horner - 537

WITNESS.

(Competency of.)

Vide AFFIDAVIT.—EVIDENCE.

WOOL.

Vide MODUS.

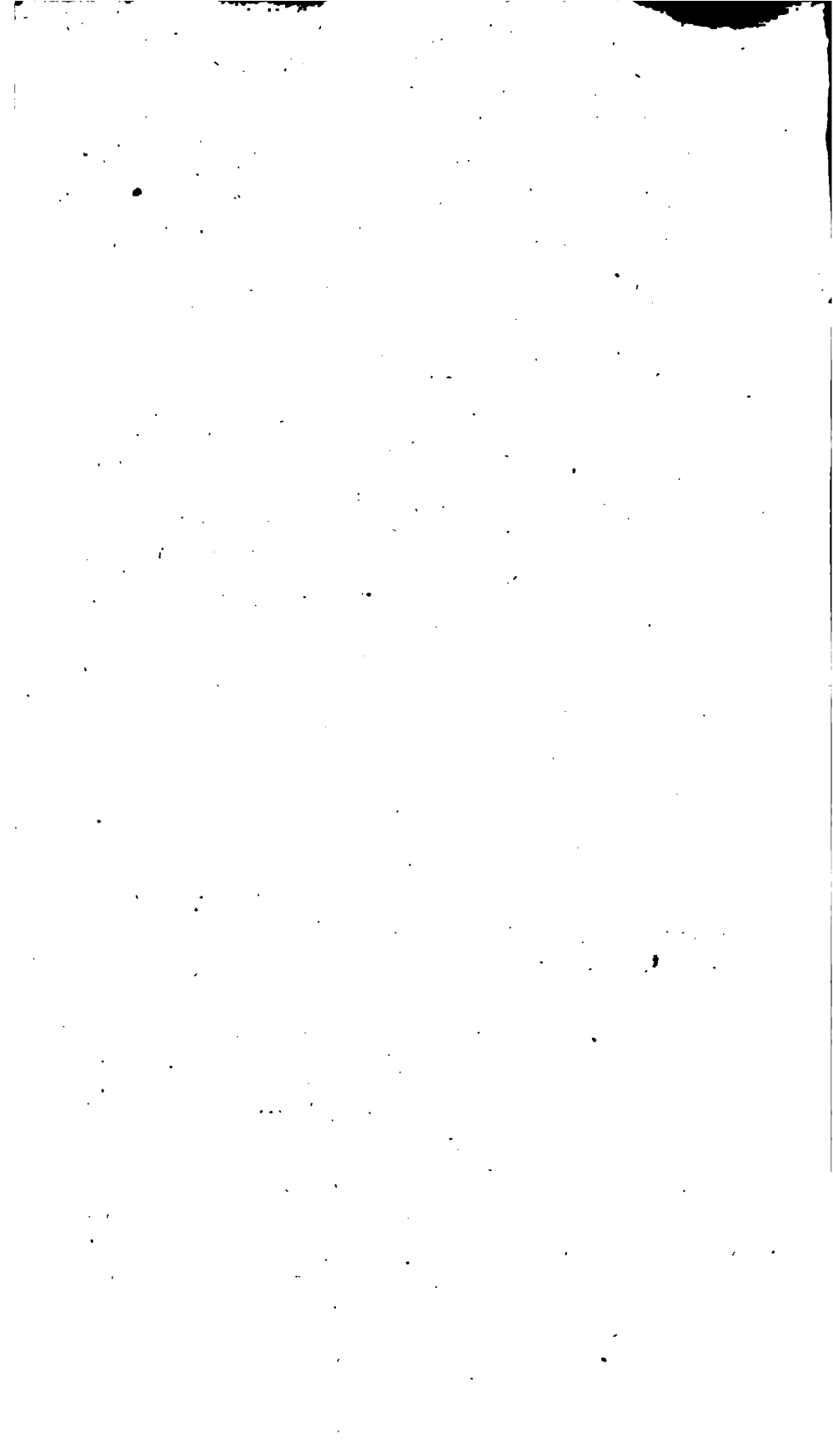
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(*Ex certa scientiâ speciali gratiâ, &c.*)

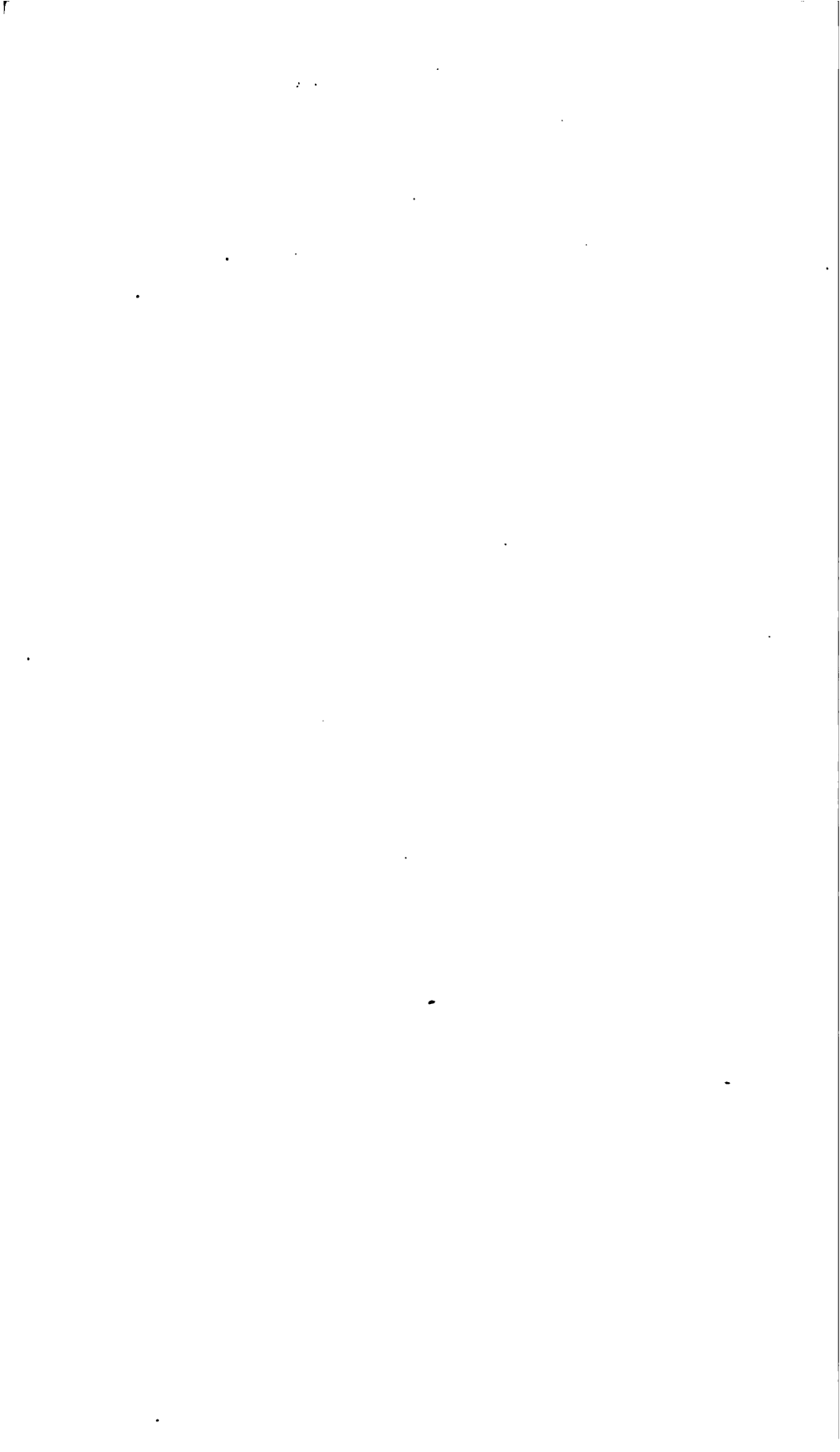
(*Effect of, in royal grants.*)

Vide CONSTRUCTION OF GRANT.
MODO ET FORMA.

END OF THE FIFTH VOLUME.







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